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## 2004 Government Contract Decisions of the Federal Circuit

David Robbins

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## 2004 Government Contract Decisions of the Federal Circuit

# ARTICLES

## ANTHRAX HOAXES

IRA P. ROBBINS\*

### TABLE OF CONTENTS

|  |    |
|--|----|
| Introduction.....  | 3  |
| I. Federal Hoax Crime Legislation.....   | 11 |
| A. Constitutional Powers Justifying a Federal Hoax Crime<br>Bill .....   | 11 |
| 1. Introduction.....   | 11 |
| 2. <i>United States v. Lopez</i> : Limits of the Commerce<br>Clause as justification for a federal hoax crime bill ..... | 12 |
| 3. Supremacy and preemption justifying a federal<br>hoax crime bill .....  | 14 |
| 4. Uniformity as a justification for a federal hoax<br>crime bill .....  | 16 |
| B. Federal Hoax Crime Legislation Before September 11,<br>2001 .....   | 17 |
| 1. 18 U.S.C. § 2332a .....   | 17 |
| 2. 18 U.S.C. § 876 .....   | 21 |
| 3. 18 U.S.C. § 175(a) .....  | 23 |
| 4. 18 U.S.C. § 229 .....   | 24 |
| C. Federal Hoax Crime Legislation After September 11,<br>2001 .....  | 25 |
| 1. 107th Congress.....   | 25 |
| a. S. 1658.....  | 25 |

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|   |    |
|---|----|
| b. S. 1666.....   | 26 |
| c. S. 1719.....   | 26 |
| d. H.R. 3209.....   | 27 |
| 2. 108th Congress.....  | 27 |
| a. S. 22.....   | 27 |
| b. H.R. 1678.....   | 28 |
| II. State Legislation .....   | 28 |
| A. Constitutional Issues and Challenges Facing Hoax<br>Crime Legislation .....                    | 28 |
| B. State Hoax Crime Statutes Before<br>September 11, 2001.....                                    | 30 |
| 1. False reporting: misdemeanor offenses<br>for disruption of public functions.....               | 31 |
| 2. Hoax crimes .....  | 33 |
| 3. Terroristic threats .....  | 35 |
| C. State Hoax Crime Legislation Following<br>September 11, 2001.....                              | 39 |
| III. Problems with Current Anthrax Hoax Laws and<br>Proposed Legislation.....                     | 49 |
| A. Definitional and Textual Problems .....  | 49 |
| B. Acti Rei.....  | 50 |
| 1. Terroristic threats .....  | 51 |
| 2. False reports .....  | 52 |
| 3. Hoax crimes .....  | 53 |
| C. Problems with States' Current Mens Rea<br>Requirements.....                                    | 55 |
| 1. Specific intent .....  | 55 |
| 2. The reasonableness standard and the victim's<br>mens rea .....                                 | 57 |
| 3. Strict liability .....   | 57 |
| 4. Due process problems with mens rea requirements:<br>unduly vague or overly broad mens rea..... | 58 |
| D. Overly Severe and Disproportional Penalties .....  | 58 |
| IV. Recommendations.....  | 61 |
| A. Introduction .....   | 61 |
| B. Actus Reus.....  | 63 |
| 1. Introduction.....  | 63 |
| 2. Weapons of mass destruction definition for the<br>three acti rei.....                          | 64 |
| 3. False reports actus reus.....  | 65 |
| 4. Hoax crime actus reus .....  | 65 |
| 5. Terroristic threats actus reus .....   | 66 |
| C. Mens Rea.....  | 67 |
| 1. False reports mens rea .....   | 67 |
| 2. Hoax crime mens rea.....   | 67 |
| 3. Terroristic threats mens rea .....   | 68 |
| D. Penalty.....   | 69 |
| E. Defenses to Hoax Crime Prosecution: Impossibility<br>and Mistake.....                          | 70 |



Conclusion ..... 72  
Proposed Statute ..... 73

INTRODUCTION

“[Y]ou are a disgusting piece of dirt.”<sup>1</sup> Judge Steven Shutter, a county judge in South Florida, used these words to describe a twenty-four-year-old woman whom he labeled a terrorist<sup>2</sup> and who was condemned by the media.<sup>3</sup> Aside from name-calling, Judge Shutter raised the woman’s bail from \$3,500 to \$25,000 when he learned the nature of the offense, “just in case” the woman might be able to afford the lower bond.<sup>4</sup> Given the strength of Judge Shutter’s animosity toward her, one might assume that Yasmin Kassima Sealey-Doe had provided assistance to the terrorists who attacked the World Trade Center and the Pentagon on September 11, 2001. Or perhaps she had participated in some scheme to infect the population of Broward County, Florida with anthrax?

In fact, Sealey-Doe did not participate in, assist, or abet any terrorist activity.<sup>5</sup> This young purported “terrorist” mailed flour and sugar to her ex-boyfriend because she was angry about their breakup.<sup>6</sup> The flour-sugar combination leaked out of the envelope into a postal truck and a hamper in the annex of her building,<sup>7</sup> leading to a day-long decontamination effort.<sup>8</sup> Sealey-Doe immediately confessed.<sup>9</sup> She faced a maximum sentence of fifteen years in prison for her ill-considered prank.<sup>10</sup>

While the case of Sealey-Doe is one of the more high-profile examples of an anthrax hoaxster confronting severe repercussions, she is hardly alone in her “crime.” According to one account, more

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1. Ardy Friedberg, *Anthrax Hoax Guilt Denied; Powder Sent Through Mail, Police Charge*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Dec. 27, 2001, at 4B (quoting Judge Steven Shutter).  
2. See *The O'Reilly Factor: Follow-Up: Interview with Stephen Shutter, Stanley Cohen and Spencer Cronin* (Fox News Television Broadcast, Nov. 14, 2001) (providing a transcript of an interview between Judge Shutter and television commentator Bill O'Reilly), available at 2001 WL 5081914.  
3. See *id.* (quoting Bill O'Reilly's suggestion that Judge Shutter should preside over Sealey-Doe's trial because she deserves a "suitable punishment").  
4. See *id.* (providing a transcript of Judge Shutter's interaction with Sealey-Doe).  
5. See Friedberg, *supra* note 1, at 4B (describing the history of Yasmin Kassima Sealey-Doe's arrest and arraignment on charges of attempted use of a hoax weapon of mass destruction).  
6. See *id.* (noting that the Sealey-Doe letter was sent "at the height of the anthrax scare in October [2001]").  
7. *Id.*  
8. *Id.*  
9. *Id.*  
10. *Id.*

than 15,000 anthrax hoaxes were made between September 2001 and August 2002.<sup>11</sup> These hoaxsters contributed to a national climate of anthrax paranoia by mailing envelopes containing flour,<sup>12</sup> sugar,<sup>13</sup> cornstarch,<sup>14</sup> Tylenol,<sup>15</sup> sand,<sup>16</sup> talcum powder,<sup>17</sup> body deodorant,<sup>18</sup> or, in one case, parmesan cheese.<sup>19</sup> These attacks inspired strong rhetoric from the federal government,<sup>20</sup> galvanized local media,<sup>21</sup> and polarized communities over the issue of how such anthrax hoaxsters should be treated.<sup>22</sup> These scenarios could recur if homeland security tensions continue to escalate.<sup>23</sup>

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11. *Wolf Blitzer Reports: Nine-Year-Old Kidnapped From California Home; Ricci Undergoes Surgery After Suffering Aneurysm; Is Iran Sheltering al Qaeda Leaders?* (Cable News Network Television Broadcast), Aug. 28, 2002, available at <http://www.cnn.com/TRANSCRIPTS/0208/28/wbr.00.html>.

12. See Jon Ronson, *Hoax*, GUARDIAN (London), Oct. 5, 2002, at 16 (considering himself the anthrax hoax king, Clayton Lee Waagner mailed 500 letters filled with flour to abortion clinics around the country as a hoax).

13. See Friedberg, *supra* note 1, at 4B (describing the contents of Sealy-Doe's letter as a mixture of flour and sugar).

14. See Kathleen Chapman, *Anthrax Prank Gets Man Fine, Service, Probation*, PALM BEACH POST, Jan. 26, 2002, at 1B (reporting the story of Richard Gabrich, who sent cornstarch to a friend in an envelope as a practical joke).

15. See Ludmilla Lelis, *Deltona Boy Not Held on Anthrax; A Youth From Palm Coast Will Be Charged with a Weapons Scare*, ORLANDO SENTINEL, Oct. 27, 2001, at C3 (detailing the story of a high-school student who placed Tylenol on his teacher's desk as a practical joke).

16. See Michael Higgins, *Justice Varies in Anthrax Hoaxes Charges; Sentences Are Inconsistent*, CHI. TRIB., Oct. 27, 2002, at 1 (reporting the story of Timothy Kato, who sent sand and letters warning of anthrax to two professors).

17. *Id.* (mentioning the story of Pearl Rickert, who sent talcum powder to an auto mechanic whom she thought had ripped her off).

18. See Tim McGlone, *Anthrax Hoax Puts Peninsula Man in Prison for 16 Months*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk, Va.), May 29, 2002, at B3 (chronicling the story of Clifton Gilchrist Jr., who mailed body deodorant to an insurance agent after she had been rude to him).

19. See *Cheese Prank Leads to Charges*, PATRIOT-NEWS (Harrisburg, Pa.), Oct. 19, 2001, at A12 (explaining that the alleged hoaxster, Robert Kent Henderson, mailed cheese to a colleague in California with a return address for "Mohamed").

20. See Press Release, Dep't of Justice, Fed. Bureau of Investigation (Dec. 20, 2001), available at 2001 WL 1638576 (warning that the FBI would rigorously investigate and arrest individuals who commit "hoax crimes"). The press release quotes FBI Director Robert Mueller as stating that the FBI "will not tolerate these serious violations of federal law. These investigations place a severe strain on law enforcement and public health resources and violators will be prosecuted to the fullest extent of the law." *Id.*

21. See, e.g., Andrea Peyser, *Nassau Finally Gets It: Hoax Is No Joke*, N.Y. POST, Oct. 29, 2001, at 4 (exulting over the fact that the author of the article contributed to the prosecutors' decision to upgrade charges against alleged anthrax hoaxster John Rodier from misdemeanor harassment to felony falsely reporting an incident).

22. See Higgins, *supra* note 16, at 1 (noting disparities in anthrax hoax sentencing).

23. John Bersia, *Eliminate Smallpox As Terrorist Tool*, ORLANDO SENTINEL, Oct. 7, 2002, at A11. See Ceci Connolly, *Homeland Bill Covers Smallpox Shot Liability*, WASH. POST, Nov. 16, 2002, at A13 (reporting that the Bush Administration, voicing increased fears over the threat of a biological attack, has moved a step closer to a voluntary national smallpox vaccination program by offering full legal protection to

Considering the potential consequences of a real anthrax attack, government officials have good reason to take these hoaxes seriously. Terrorists are most likely to use the inhalation anthrax form of the bacterium *Bacillus anthracis*.<sup>24</sup> Inhalation of anthrax spores, even in extremely low quantities, is ninety percent fatal unless the victim is treated immediately with massive quantities of antibiotics.<sup>25</sup> Inhalation of anthrax causes fatigue, coughing, fever, and chest pains and, if untreated, leads to death within three to twenty-four hours.<sup>26</sup> Some experts estimate that as little as a single gram of effectively distributed anthrax<sup>27</sup> could kill more than one-third of the U.S. population.<sup>28</sup> The appreciable dangers of anthrax poisoning played out in October and November 2001, when letters containing actual anthrax spores were sent through the mail, resulting in five deaths and twenty hospitalizations.<sup>29</sup> Jon Ronson, of Britain's *The Guardian*, reflected, "If September 11 had mangled America's psyche, this pulverized it."<sup>30</sup> In the aftermath, U.S. lawmakers rushed to create laws that would protect the public from real and hoax biological weapon attacks.

Lawmakers face particular difficulty in pinpointing potential hoaxsters because they do not fit a single profile. Hoaxsters range

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manufacturers and medical personnel who administer the vaccine pursuant to a provision in the Department of Homeland Security bill, H.R. 5005, 107th Cong. (2002)).

24. See CENTERS FOR DISEASE CONTROL, DIVISION OF BACTERIAL AND MYCOTIC DISEASES, DISEASE INFORMATION: ANTHRAX (May 2, 2003), at [http://www.cdc.gov/ncidod/dbmd/diseaseinfo/anthrax\\_g.htm](http://www.cdc.gov/ncidod/dbmd/diseaseinfo/anthrax_g.htm) (on file with the American University Law Review) (identifying three forms of anthrax as cutaneous, gastrointestinal, and inhalation).

25. See Barry Kellman, *Biological Terrorism: Legal Measures for Preventing Catastrophe*, 24 HARV. J.L. & PUB. POL'Y 417, 433-34 (2001) (explaining the advantages and disadvantages for a terrorist attempting to use anthrax as a weapon and designating anthrax as the terrorist's "biological agent of choice"); see also NATIONAL INSTITUTE OF HEALTH, MEDLINE PLUS, MEDICAL ENCYCLOPEDIA: ANTHRAX, at <http://www.nlm.nih.gov/medlineplus/print/ency/article/001325.htm> (last updated Aug. 15, 2003) (on file with the American University Law Review) (evaluating rate of fatality in two stages of inhalation anthrax).

26. NATIONAL INSTITUTE OF HEALTH, MEDLINE PLUS, MEDICAL ENCYCLOPEDIA: ANTHRAX, at <http://www.nlm.nih.gov/medlineplus/print/ency/article/001325.htm> (last updated Aug. 15, 2003) (on file with the American University Law Review).

27. See Kellman, *supra* note 25, at 433, 437 (arguing that, if disseminated, anthrax could get into the lungs of most people in a closed, positive air pressure environment).

28. *Id.* at 433.

29. See Wayne Washington, *Fighting Terror Global Impact; Anthrax Probe Raises Doubts on FBI*, BOSTON GLOBE, Sept. 23, 2002, at A1. Authorities continue to investigate their prime suspect, Steven J. Hatfill, a germ warfare specialist. *Id.* Nicholas D. Kristof, *Anthrax Case Raises Larger Issues*, SEATTLE POST-INTELLIGENCER, Aug. 16, 2002, at B6.

30. Ronson, *supra* note 12, at 16.

from Joyce Godbout, a sixty-nine-year-old community activist,<sup>31</sup> to a ten-year-old boy who wanted to get out of school for the day.<sup>32</sup> Police officers,<sup>33</sup> firefighters,<sup>34</sup> teachers,<sup>35</sup> city council members,<sup>36</sup> college students,<sup>37</sup> and even former prosecutors<sup>38</sup> have been arrested for perpetrating anthrax-related hoaxes.

These hoaxsters' motives are just as random as their collective identities. Some suffered from mental illness,<sup>39</sup> some perpetrated

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31. See Meredith Goldstein, *Lawyer Says Mental Strain Was Behind Anthrax Hoax*, BOSTON GLOBE, Apr. 7, 2002, at Globe West 1 (explaining that Godbout's lawyer will argue that Godbout suffered from diminished capacity resulting from the emotional stress of prior criminal charges she faced).

32. See Sean Kelly, *Anthrax Prankster, 10, Detained; Youth Who Wanted to Be Hero May Face Felony*, DENVER POST, Oct. 21, 2001, at B01 (explaining that the boy claimed that the baby formula was anthrax so he would be declared a hero for discovering it and would get out of school for the day), available at 2001 WL 27669476.

33. See, e.g., *Not Funny*, ARIZ. DAILY STAR, Nov. 24, 2001, at B6 (commenting on a *Philadelphia Inquirer* story reporting the arrests of two police officers for making a false report of anthrax over their police radio); Neely Tucker, *Officer on Trial in Case of Anthrax Hoax*, WASH. POST, Nov. 15, 2002, at B4 (detailing the arrest and trial of a U.S. Capitol Police officer who sprinkled granules of artificial sweetener on a guard station desk and posted a note reading, "PLEASE INHALE. YES THIS COULD BE? CALL YOUR DOCTOR FOR FLU SYMPTOMS. THIS IS A CAPITOL POLICE TRAINING EXERCISE! [sic] I HOPE YOU PASS!").

34. See, e.g., John Beauge, *Firefighter Ordered to Stand Trial; Man Accused of Staging Anthrax Hoax That Cost Williamsport \$11,144*, PATRIOT-NEWS (Harrisburg, Pa.), Nov. 14, 2001, at B12 (covering the story of Steven Welch, a Pennsylvania firefighter who falsely claimed to be the victim of an anthrax attack).

35. See Kevin Mayhood, *Anthrax Hoax Costs Teacher \$150 Fine*, COLUMBUS DISPATCH, Jan. 18, 2002, at 4B (reporting that an Ohio science teacher pleaded guilty to disorderly conduct for mailing a letter containing powdered calcium carbonate from her school to her brother to avoid the more serious charges of inducing panic, petty theft, and unauthorized use of property).

36. See David Slade, *Councilman Says He'd Never Joke About Anthrax*, ALLENTOWN MORNING CALL (Allentown, Pa.), Mar. 29, 2002, at B1 (explaining that Robert Niehoff, a 76-year-old city councilman, faced false reporting charges after telling the secretaries at the local Borough Hall that he had gotten white powder on his clothes while collecting the mail).

37. See, e.g., Nicholas Alajakis, *Northern Illinois U. Student Faces Felony Charge for Anthrax Joke*, NORTHERN STAR (N. Ill. Univ.), Nov. 2, 2001 (reporting the arrest of a Northern Illinois University freshman, Bryan Magnall, for allegedly leaving an envelope filled with white powder in a school building), available at 2001 WL 29605837; DICKINSON COLLEGE EMERGENCY INFORMATION, INFORMATION FROM MAYOR KIRK WILSON, at <http://www.dickinson.edu/contact/20011031.html> (Oct. 31, 2001) (on file with the American University Law Review) (detailing the arrest of a Dickinson College senior who was accused of filling envelopes with a baking soda-like substance and inserting a note reading, "You now have anthrax; prepare to die," near the campus mailroom).

38. See Carlos Sadovi, *Ex-Prosecutor in Court in Anthrax Hoax; Freed Without Bond; Scare Was Allegedly Aimed at Colleague*, CHI. SUN-TIMES, Nov. 9, 2001, at 14 (explaining that James Vasselli, a former prosecutor, was arrested on charges of felony disorderly conduct for allegedly placing a suspicious letter on a colleague's desk).

39. See, e.g., Jean Lacoe, *Terror of the Mind*, WILKES-BARRE TIMES LEADER (Wilkes-Barre, Pa.), Mar. 3, 2002, at 1A (reporting the story of Emily Forman, a Wilkes-Barre woman who pleaded guilty to mailing a suspicious substance and who was the victim of childhood physical and sexual abuse and suffered from bipolar disorder), available at 2002 WL 7759278. Forman claimed that she participated in an anthrax hoax with

their hoax out of a need for personal revenge,<sup>40</sup> some viewed their crimes as a political statement,<sup>41</sup> and some simply intended to commit nothing more than a practical joke.<sup>42</sup> One person apparently made a false report to police officials because he wanted to be deported to India.<sup>43</sup>

In response to this hoax epidemic, state and federal prosecutors have promised to punish all anthrax hoaxsters severely.<sup>44</sup> Recent examples highlight how certain responses have succeeded more than others:

Three Bloomington, Illinois women were arrested in the fall of 2001, during the height of the anthrax scare, for filling an envelope with crushed candy and leaving it at a local auto parts store.<sup>45</sup> The women later said they were playing a practical joke, but the authorities took it seriously, charging the perpetrators with felony disorderly conduct.<sup>46</sup> All three women pleaded guilty to a reduced charge of misdemeanor attempted disorderly conduct involving a false biological contaminant and received a stayed 180-day jail

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her roommate, Rosemary Zavrel, at Zavrel's insistence and under the influence of her bipolar disorder. *Id.* See *infra* notes 49-52 and accompanying text (discussing Zavrel's case).

40. See Friedberg, *supra* note 1, at 4B (revealing that the defendant in that case sent a hoax anthrax letter because she was angry with her ex-boyfriend).

41. See, e.g., Kristen Babiracki, *Anthrax Unfolds Near USC*, DAILY TROJAN (Univ. of S. Cal.), Mar. 21, 2002 (reporting an anthrax hoax perpetrated against the California Chicano News Media Association as part of a hate letter campaign), available at 2002 WL 16983811; Denes Husty, *Planned Parenthood Picketed*, NEWS-PRESS (Ft. Myers, Fla.), Mar. 21, 2002, at 2B (discussing the impact of anthrax threats to Planned Parenthood clinics from anti-abortion crusaders such as Clayton Lee Waagner), available at 2002 WL 16582276.

42. See, e.g., *Fla. Man Sentenced for Anthrax Hoax*, AP ONLINE, Mar. 15, 2002, available at 2002 WL 16390521 (reporting the sentencing of Ronald Hilburn, a Florida tennis professional who sprinkled flour over a basket of Halloween candy as a joke). Hilburn was sentenced to two years probation, fined \$1,000, ordered to serve 100 hours of community service, and ordered to apologize to the children and families who had been frightened by the hoax. *Id.*

43. See Patricia Hurtado, *Deportation Aim of Hoax, Police Say*, PATRIOT-NEWS (Harrisburg, Pa.), Nov. 8, 2001, at A17 (noting that the defendant in the case, Nixon Saldanha, who came to the United States in 1997 on a visitor's visa, faces a ten-year sentence in a federal prison rather than being deported to Bombay). Other anthrax hoaxsters do face deportation for their pranks. See *Los Angeles Man to Be Deported for Mailing Anthrax Threat*, L.A. TIMES, Jan. 4, 2002, at B4 (reporting that Justo Saldana, an illegal immigrant who allegedly mailed an anthrax threat to the Long Beach City Hall as a practical joke, will be turned over to the U.S. Immigration and Naturalization Service for deportation to Mexico).

44. See *supra* note 20 and accompanying text; Martin Kasindorf & Toni Locy, *Anthrax Hoaxes Persist Despite Arrests; Angry Prosecutors Seeking Jail Time for Pranks, Threats*, USA TODAY, Nov. 6, 2001, at A01 (noting that the number of imitation anthrax crimes is increasing despite state efforts to prosecute the perpetrators).

45. Steve Silverman, *Fake-Anthrax Defendants Sentenced*, PANTAGRAPH (Bloomington, Ill.), June 8, 2002, at A3.

46. *Id.*

sentence.<sup>47</sup> The McLean County Circuit Court ordered the women to pay more than \$5,000 in restitution to the U.S. Postal Service and to local police for the costs of the investigation.<sup>48</sup>

A Pennsylvania woman, Rosemary Zavrel, was convicted in June 2002 on federal charges of mailing threatening letters, aiding and abetting in mailing threatening letters, making false statements to the police, and for trying to mail anthrax hoax letters to government officials.<sup>49</sup> She and a friend, Emily Foreman, mailed seventeen letters in an attempt to frame two teens who were picking on Zavrel's son.<sup>50</sup> While the maximum sentence for each charge was five years in prison,<sup>51</sup> Zavrel and Foreman received thirty months and fourteen months, respectively.<sup>52</sup>

Another Pennsylvania resident, Robert Larry Jacoby, Jr., phoned in three fake bomb and anthrax scares to the Lehigh County Courthouse. After pleading guilty to three counts each of making terroristic threats and bomb threats, he was sentenced to ten to twenty-seven years in state prison.<sup>53</sup> The judge justified the harsh sentence because of the precarious situation the threats had imposed on the entire county's court system and emergency management personnel. In response, Jacoby's attorney remarked,

I can tell you personally, because I was in court on those days, that nobody felt threatened or traumatized. . . . This wasn't a bin Laden type of thing where he struck fear in the hearts of the city. It was a stupid hoax, and he got the max for it. He has some time to do, he should be punished. But I've seen people slit throats and get less.<sup>54</sup>

In Texas, Dustin Limberg sent fake anthrax to intimidate a girl who was going to testify against him.<sup>55</sup> After pleading guilty to a misdemeanor charge of harassing a witness, a charge that was

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47. *Id.*

48. *Id.*

49. Associated Press, *Woman Found Guilty in Anthrax Hoax*, July 13, 2002, available at <http://www.anthrax-investigation.com/hoaxes.html#ap020713> (explaining that the women tried to mail their cornstarch-filled letters to President Bush, local judges, and other authorities).

50. *See id.* (stating that the envelopes were marked with the return addresses of the two boys).

51. *Id.*

52. *Women Sentenced for Mailing Fake Anthrax*, AP ONLINE, Feb. 10, 2003, available at 2003 WL 11479378. In a 2-1 decision, the Third Circuit affirmed the convictions. *United States v. Zavrel*, 384 F.3d 130 (3d Cir. 2004).

53. Jimmy P. Miller, *Man Gets Max for Anthrax Threat*, EXPRESS-TIMES (Easton, Pa.), Aug. 27, 2002, available at <http://www.anthraxinvestigation.com/hoaxes.html#et020827>.

54. *Id.*

55. *See* Brian Barber, *One-Year Sentence Levied for Bogus Anthrax Threat Maker*, TULSA WORLD (Tulsa, Okla.), June 15, 2002, at A14 (explaining that a seventeen-year-old Texas girl was testifying against him in a stolen car case).

negotiated down from threatening to use a weapon of mass destruction,<sup>56</sup> he was sentenced to one year of probation and ordered to complete a mental health program.<sup>57</sup>

Californian Antonio Flores was sentenced to twenty-one months in prison for mailing three hoax anthrax letters laced with Victoria's Secret talcum powder.<sup>58</sup>

In Virginia, Clifton Gilchrist sent an anthrax hoax letter to an insurance agent who was rude to him.<sup>59</sup> The court sentenced him to sixteen months in prison after he pleaded guilty to mailing a threatening letter.<sup>60</sup> Gilchrist had faced a maximum penalty of five years in prison and a \$250,000 fine.<sup>61</sup>

Perhaps the most famous anthrax hoaxster charged with false reporting is James "J.J." Pickett, a U.S. Capitol Police Officer.<sup>62</sup> On a desk in a House of Representatives office building, Pickett had left a pile of artificial sweetener with the words "PLEASE INHALE" on an accompanying note.<sup>63</sup> Even though the opened packages of sweeteners had been left in plain view on the desk,<sup>64</sup> Pickett was arrested on charges of making false statements and obstructing the police.<sup>65</sup> Because of his occupation and the relatively innocuous nature of his hoax,<sup>66</sup> Pickett has emerged as a lightning rod of controversy regarding the Justice Department's announced campaign

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56. *Id.* The prosecutors explained that the misdemeanor plea was offered partially because of the defendant's lack of access to real anthrax and the fact that the envelope had been detected before it entered the mail system. *Id.*

57. *See id.* (describing the sentence given by the federal judge).

58. Agence France Presse, *California Man Sentenced in Triple Anthrax Hoaxes*, June 14, 2002, at § Domestic, non-Washington, General News (reporting that the defendant sent three letters containing threats such as "ANTHRAX you're gonna Die!" and "I will Kill You . . . Soon.").

59. *See McCormick Inducted as a Virginia Legend*, RICHMOND TIMES-DISPATCH (Richmond, Va.), May 30, 2002, at B2 (reporting that, after the hoax, the mail carrier who handled the letter had to be decontaminated and was prescribed anti-anthrax medication), available at 2002 WL 7201135.

60. *Id.*

61. *Id.*

62. *See* Jim Oliphant, *Anthrax Joke: Nobody's Laughing*, LEGAL TIMES, Apr. 1, 2002, at 1 (investigating the furor over Pickett's arrest and future trial).

63. *See id.* (stating that everyone at the scene knew that Pickett had written the note, which read, "PLEASE INHALE. YES COULD THIS BE? CALL YOUR DOCTOR FOR FLU-SYMPTOMS. THIS IS A CAPITOL POLICE TRAINING EXERCIZE! [sic] I HOPE YOU PASS!").

64. *See* Jim Abrams, *Cop May Face Jail Over Anthrax Hoax*, AP ONLINE, Apr. 5, 2002, available at 2002 WL 18179974 (reporting that Pickett contends that torn packets of artificial sweetener were in clear view on the police post desk).

65. *See id.* (noting that, if convicted, Pickett could serve up to five years in prison and be fined up to \$250,000).

66. *See* Oliphant, *supra* note 62, at 1 (pointing out that all parties involved quickly realized the nature of the hoax, that Pickett immediately admitted to the hoax, and that Pickett had a reputation as a practical joker).

to prosecute any and all hoax crimes to the fullest extent of the law.<sup>67</sup> While at the district court level Pickett received no jail time and just two years probation for making false statements,<sup>68</sup> recently his conviction was overturned on appeal.<sup>69</sup> The United States Court of Appeals for the D.C. Circuit held that, to be convicted for making false statements, those statements must be made in connection with an ongoing investigation.<sup>70</sup>

While prosecutors struggle to stretch laws to fit the facts of these false reports and hoax crimes,<sup>71</sup> federal and state legislators are both amending existing laws to be more effective and severe and creating new laws to deal with the problems of hoax crimes.<sup>72</sup> State legislators have taken the lead in enacting statutes that purport to be fair and productive tools for prosecuting and deterring such hoaxes;<sup>73</sup> however, many states—in the panicked heat of the moment—have left out important components in their terror hoax statutes,<sup>74</sup> making the successful and fair prosecution of offenders a difficult task.<sup>75</sup>

This Article considers whether hoax legislation should be a state or federal matter,<sup>76</sup> reviews federal and state statutes used to prosecute anthrax hoax crimes before September 11,<sup>77</sup> analyzes legislation introduced in response to the terrorist attacks on September 11,<sup>78</sup> and recommends a model hoax crime statute.<sup>79</sup> While the Article compares state and federal legislation, it focuses primarily on state legislation, because such legislation has incorporated more innovative approaches. This is not to say, however, that anthrax hoax crime legislation should be a state matter rather than a federal concern. A sweeping federal bill would ensure uniformity in

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67. See *id.* (outlining the major legal concerns at issue in this case).

68. See Neely Tucker, *Officer Sentenced for Anthrax Prank*, WASH. POST, Feb. 12, 2003, at A2 (convicting him for false reporting, the judge suspended his probation while the conviction was appealed).

69. *United States v. Pickett*, 353 F.3d 62 (D.C. Cir. 2004); see also Neely Tucker, *Officer's Conviction Overturned in Anthrax Prank*, WASH. POST, Jan. 10, 2004, at B3.

70. See *Pickett*, 353 F.3d at 68-69.

71. See Kasindorf & Locy, *supra* note 44, at A1 (noting that “[b]ioterrorism pranks and threats continue to vex authorities” despite promises by Attorney General John Ashcroft to “crack down” on such crimes).

72. See *infra* Parts II.C and III.C.

73. See *infra* Part III.C.

74. See *infra* Part IV.C.

75. See Andy Thibault, *One Federal Judge Stands Up*, CONN. L. TRIB., June 2, 2003, at 18 (reporting that U.S. District Judge Alfred Covello refused to impose the jail sentence that U.S. Attorney General John Ashcroft wanted for falsely reporting an anthrax hoax), available at 6/2/2003 CTLAWTRIB 18 (WESTLAW).

76. See *infra* Parts II.A and III.A.

77. See *infra* Parts II.B and III.B.

78. See *infra* Part III.C.

79. See *infra* Part V.



interpretation and implementation by creating a national web to trap hoax perpetrators regardless of where they commit their crimes.<sup>80</sup> The Article concludes with a recommendation that the federal government adopt a hoax crime statute that includes a mens rea requirement based on the mindset of the perpetrator and three separate acti rei—false reports, hoaxes, and terroristic threats—with punishment tailored to the perpetrator's actual mens rea. Regardless of whether the federal government adopts these laws, the states should employ statutes that are based on this formulation.

## I. FEDERAL HOAX CRIME LEGISLATION

### A. *Constitutional Powers Justifying a Federal Hoax Crime Bill*

#### 1. *Introduction*

As an initial matter, one must determine the level of government from which hoax legislation should originate.<sup>81</sup> Criminal legislation at the federal level is controversial because creating and enforcing criminal law traditionally has resided with the states.<sup>82</sup> To circumvent this tradition, the federal government must base its criminal legislation on one of its enumerated powers in the Constitution.

Although both state and federal legislators have drafted statutes to deter and punish terrorist activities, it makes most sense for the federal government to adopt a federal universal hoax crime statute to ensure uniformity in the prosecution of hoax perpetrators. Provided

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80. This bill mirrors the proposed national response plan under the Department of Homeland Security bill, which encourages cooperation among state law enforcement operations.

81. James Madison stated in the *Federalist Papers* that the powers of the federal government are few and defined, whereas "[t]he powers reserved to the several States extend to all objects that, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the States." THE FEDERALIST No. 45, at 313 (James Madison) (Jacob E. Cooke ed. 1961). In apparent contradiction to Madison's assertion, recent federal criminal legislation significantly blurs the line between federal and state prosecutorial powers. For example, the Racketeer Influenced and Corrupt Organizations Act (RICO) allows a state substantive offense to be charged as a federal crime when part of an enterprise. 18 U.S.C. §§ 1961, 1968 (2002). Academics criticize such a federalization of criminal law as an inappropriate assertion of federal power over the domain of state regulation. See Sanford Kadish, *The Folly of Overfederalization*, 46 HASTINGS L.J. 1247, 1248 (1995) (arguing that the expansion of federal authority in criminal matters, turning traditional state offenses into federal ones, raises serious cause for concern); see also Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 854 (2002) (discussing the basis of criminal laws in the Commerce Clause).

82. See Bork & Troy, *supra* note 81, at 891.

that it withstands constitutional scrutiny, a federal hoax crime law would trump comparable state legislation.<sup>83</sup>

2. *United States v. Lopez: Limits of the Commerce Clause as justification for a federal hoax crime bill*

For most of the 20th century, courts construed the Commerce Clause<sup>84</sup> as giving Congress broad authority to regulate activities, including criminal conduct, that traditionally were under the jurisdiction of the states.<sup>85</sup> Recently, however, the Supreme Court has limited this power.<sup>86</sup> In *United States v. Lopez*,<sup>87</sup> the Supreme Court, in 1995, held that Congress may exercise its Commerce Clause power only when regulating "the channels of interstate commerce, . . . the instrumentalities of interstate commerce . . . [or] activities that substantially affect interstate commerce."<sup>88</sup> *Lopez* represents a significant break from prior Commerce Clause jurisprudence, which merely required an effect on interstate commerce to justify federal legislation.<sup>89</sup> The Supreme Court reaffirmed *Lopez* in 2000, in *United*

83. See *infra* Parts II.A.2-II.A.4 (suggesting that the federal government can justify such national anti-terrorism legislation based on its Commerce Clause power).

84. U.S. CONST. art. I, § 8 (providing Congress with the power to regulate commerce "among" states).

85. See Bork & Troy, *supra* note 81, at 881-83 (discussing the history of the Commerce Clause and the Supreme Court's varying interpretation of the clause's scope).

86. See Grant S. Nelson, *A Commerce Clause Standard for the New Millennium: "Yes" to Broad Congressional Control Over Commercial Transactions; "No" to Federal Legislation on Social and Cultural Issues*, 55 ARK. L. REV. 1213, 1215 (2003) (arguing that, following *Lopez*, the Court returned to a narrow understanding of the Commerce Clause, holding that the clause applies only to the "channels" and "instrumentalities" of interstate commerce and to those "activities that substantially affect interstate commerce").

87. 514 U.S. 549 (1995).

88. *Id.* at 558-59.

89. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (expanding the Commerce Clause to include activities that, in the aggregate, affect interstate commerce); see also *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964) (holding that congressional power in the field of commerce is so broad and sweeping that, where Congress keeps within its sphere and violates no express constitutional limitation, the Supreme Court will not interfere). Indeed, cases like *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), which provided the lynchpin for federal civil rights statutes, may come under heightened scrutiny following *Lopez* and *United States v. Morrison*. See Christy H. Dral & Jerry J. Phillips, *Commerce By Another Name: The Impact of United States v. Lopez and United States v. Morrison*, 68 TENN. L. REV. 605, 609-12 (2001) (arguing that *Lopez* and *Morrison* constitute a significant break from earlier Commerce Clause jurisprudence that required only an effect on commerce, because these cases require that there be a direct effect on either commodities traded through commerce or the instrumentalities of commerce itself). Earlier cases had merely required that there be a net effect on someone or something that moved across state lines or participated either directly or indirectly in interstate commerce. See *id.*

*States v. Morrison*.<sup>90</sup> Therefore, any federal anti-hoax crime legislation must be able to satisfy the criteria set forth in *Lopez*.

The likelihood of passage of a federal hoax crime bill on the heels of *Lopez* is doubtful in light of the heightened judicial scrutiny courts now employ when reviewing Commerce Clause issues.<sup>91</sup> Some scholars even suggest that the entire federal criminal regime will need to be reevaluated as strengthened state sovereignty<sup>92</sup> principles are introduced into the debate over the permissible scope of federal criminal statutes.<sup>93</sup> Although it is unlikely that the entirety of federal criminal law will be reversed in the wake of *Lopez* and *Morrison*, the level of heightened scrutiny now attached to federal legislation requires Congress to justify intruding on matters that are traditionally regulated by the states.

Other constitutional provisions, in concert with the Commerce Clause, could provide justification for a federal hoax crime law.<sup>94</sup> Any new federal criminal legislation that uses the Commerce Clause as its foundation will be more likely to withstand post-*Lopez* scrutiny if it is tied to an explicit provision in the Constitution.<sup>95</sup> In the hoax crime context, Congress could point to the War Powers Clause as an

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90. 529 U.S. 598 (2000) (holding that the Commerce Clause does not vest Congress with the authority to enact a statute regulating gender-motivated crimes of violence, because such crimes are not related to economic activity).

91. See David N. Mayer, *Justice Clarence Thomas and the Supreme Court's Rediscovery of the Tenth Amendment*, 25 CAP. U. L. REV. 339, 422 (1996) (pointing to Justice Thomas's concurrence in *Lopez* for its discussion of the Tenth Amendment and the permissible extent of federal power). Mayer's predictions held true when the Supreme Court followed the majority opinion in *Lopez* when deciding *Morrison*.

92. U.S. CONST. amend. X (providing that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").

93. See Kadish, *supra* note 81, at 1250 (suggesting the use of a test developed by Professors Zimring and Hawkins as a possible justification for developing federal crimes: (i) where the federal interest is stronger and more direct than the interest of the states—for example, where the national government has a proprietary interest, as with counterfeiting, tax evasion, assault on a federal officer, espionage, national security legislation, etc.; (ii) where federal agencies enjoy a distinct comparative advantage in detecting, gathering evidence, and prosecuting, as in the case of organized crime; or (iii) where state and local law enforcement prove to be demonstrably inadequate to control some objectionable conduct). Kadish concluded by stating that the pattern of congressional overcriminalization is obvious under this test, as crimes such as carjacking, domestic violence, and guns in schools would scarcely pass muster. *Id.*

94. See George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-Lopez Analysis*, 82 CORNELL L. REV. 225, 248 (1997) (arguing that, because of the *Lopez* limits on the Commerce Clause, it would be useful to examine alternative sources for congressional authority to enact a broad statute dealing with state and local corruption).

95. *Id.* at 252-57 (suggesting that the mail fraud statute could likely survive *Lopez*'s heightened Commerce Clause scrutiny because it is attached to Congress's explicit control over the mails).

enumerated power justifying federal hoax crime legislation.<sup>96</sup> The Executive Branch could also cite the Commander-in-Chief Clause as additional support for a federal hoax crime bill.<sup>97</sup> Both of these approaches necessitate that either Congress or the Bush Administration effectively frame any anti-hoax legislation or executive order as a response to war.<sup>98</sup>

### 3. *Supremacy and preemption justifying a federal hoax crime bill*

If federal courts are willing to recognize Congress's Commerce Clause power to criminalize hoaxes, the next question may be whether a federal hoax crime law would preempt similar state legislation. When state legislation conflicts with federal legislation, the text of the Constitution's Supremacy Clause<sup>99</sup> establishes that "the clear and manifest purpose of Congress" dictates which law controls.<sup>100</sup> Rather than superseding state law, Congress could design the federal hoax law to supplement the states' deterrence of hoax crimes, much like the Racketeer Influenced and Corrupt Organizations statute<sup>101</sup> aims to curb criminal conspiratorial relationships, which traditionally fall under the jurisdiction of the states.<sup>102</sup>

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96. U.S. CONST. art. I, § 8 (providing that Congress has the power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water").

97. U.S. CONST. art. II, § 2 (providing: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.").

98. Only by persuading the judiciary that civilians are indeed combatants in a "War on Terrorism" could Congress's war powers or the Commander-in-Chief Clause give additional textual support to anti-hoax legislation or an executive order, making the law of war the applicable lens through which the judiciary will interpret any federal action.

99. U.S. CONST. art. VI (stating: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

100. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (articulating a three-part test for determining congressional intent).

101. 18 U.S.C. §§ 1961, 1968 (2002).

102. In these situations, Congress often places a savings clause in the draft of the federal legislation. The savings clause effectively indicates Congress's intent that the federal law will exist side-by-side with the state regulation. *See, e.g.*, Securities Exchange Act of 1934, 15 U.S.C. § 78bb (2002) (providing that "nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any state over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations

Nevertheless, Supremacy Clause jurisprudence indicates that a federal hoax crime law would likely preempt similar state legislation. In *City of Burbank v. Lockheed Air Terminal*,<sup>103</sup> for example, the Supreme Court held that, even though noise regulation was “deep-seated in the police power of the States,”<sup>104</sup> legislative history showed congressional intent to preempt state law.<sup>105</sup> Therefore, if state hoax crime legislation conflicts with federal objectives, any federal hoax crime statute found to be a legitimate exercise of the Commerce Clause power could become the only valid regulation.

Additionally, *Hines v. Davidowitz*<sup>106</sup> provides further support for a federal hoax crime bill if the legislation implicates foreign policy.<sup>107</sup> *Hines* held that the supremacy of national power in the general field of foreign policy and the sensitivity of the relationship between the regulation of aliens and the conduct of foreign affairs was such that it warranted federal preemption of existing state law.<sup>108</sup> The Supreme Court espoused the principle that state law must be restrained from violating the federal rule if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>109</sup>

Upon review of any proposed hoax crime bill, the judiciary will ultimately determine issues of preemption.<sup>110</sup> Considering the foregoing precedents for federal criminalization, along with the uniquely federal interests that might warrant a uniform set of hoax crime regulations, even the current Rehnquist Court might be willing to encroach on traditionally guarded realms of state regulation and police power in favor of a supreme, federal hoax crime bill.

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thereunder”). *But see* *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 898 (2000) (Stevens, J., dissenting) (arguing that the majority’s opinion that the National Traffic and Motor Vehicle Safety Act of 1966 impliedly preempted common-law tort actions is an improvident reading of the statute’s saving clause, which, in effect, severely limits plaintiffs’ rights).

103. 411 U.S. 624 (1973).

104. *Id.* at 638.

105. *Id.* at 651-53.

106. 312 U.S. 52 (1941).

107. *See id.* at 80-81 (holding that appellant’s power to legislate in the area of foreign relations was subordinate to the federal government’s power to do so under the Supremacy Clause of the U.S. Constitution).

108. *Id.*

109. *Id.* at 67.

110. *See* April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 ALA. L. REV. 1149, 1150 (2004).

#### 4. *Uniformity as a justification for a federal hoax crime bill*

When deciding whether to uphold the incorporation of state law or the fashioning of new federal law, the Supreme Court balances the need for federal uniformity and special rules to protect federal interests against the disruption that could result from creating new federal legal rules.<sup>111</sup> In the past, the Supreme Court has created federal case law in spite of controlling state precedent.<sup>112</sup> In *Clearfield Trust v. United States*,<sup>113</sup> for example, the Court held that some areas of regulation require federally imposed uniformity.<sup>114</sup> Because a federal hoax crime bill seeks to create a national standard for security, the same policy considerations seen in *Clearfield Trust* are likely to arise when drafting a federal hoax crime bill. Furthermore, in *United States v. Kimbell Foods*,<sup>115</sup> the Supreme Court held that, because a federal lien affects the entire nation, regulations must be uniform.<sup>116</sup> The Court held that it would use federal law in circumstances in which state law frustrates the specific objectives of federal programs.<sup>117</sup> The same guidelines could apply in a conflict-of-laws situation in which there is a unique federal interest in curbing hoax crimes, but in which state anti-hoax legislation presently controls.

Even staunch federalist Justices recognize that some areas warrant federal regulation, despite the fact that the regulation overlaps with the states' police powers.<sup>118</sup> For example, in *Evans v. United States*,<sup>119</sup> Justice Thomas, interpreting the Hobbs Act,<sup>120</sup> stated that "[o]ur

111. See Eric Stein, *Uniformity and Diversity in a Divided-Power System: The United States' Experience*, 61 WASH. L. REV. 1081, 1089 (1986) (indicating that the Court supports uniform legislation regulating transportation systems).

112. See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (holding that, although state law sometimes provides appropriate rules, the issuance of commercial paper is best served by a uniform rule).

113. *Id.*

114. *Id.* at 367.

115. 440 U.S. 715, 727 (1979). In *Kimbell*, the Court held that, when Congress has not spoken in an area comprising issues substantially related to an established program of government operation, *Clearfield* directs federal courts to fill the interstices of federal legislation according to their own standards. *Id.*

116. See *id.* at 726-27 (holding that, when government activities arise from and bear heavily upon a federal program, federal interests are sufficiently implicated to warrant the protection of federal law).

117. *Id.*

118. See Brown, *supra* note 94, at 249 (noting that federalist judges recognize precedent that suggests that Congress has broad power in creating legislation concerning areas traditionally regulated by the states).

119. 504 U.S. 255, 291-92 (1992) (Thomas, J., dissenting) (arguing that Congress has broad discretion to regulate in areas traditionally regulated by the states, although in sensitive areas there should be a narrow construction of such regulations since there is a possibility that they will impinge on the states and offend federalism concerns).

120. 18 U.S.C. § 371 (2002) (prohibiting actual or attempted robbery or extortion affecting interstate or foreign commerce, regardless of the manner or degree).

precedents, to be sure, suggest that Congress enjoys broad constitutional power to legislate in areas traditionally regulated by the States—power that apparently extends even to the direct regulation of the qualifications, tenure, and conduct of state government officials.”<sup>121</sup> Justice Thomas’ dissent in *Evans* indicates the lengths to which conservative Justices may be willing to go in interpreting federal regulation of state activities. As such, the federal judiciary is not likely to have qualms with a federal hoax crime bill that seeks to unify prosecutorial power post-September 11.

### B. Federal Hoax Crime Legislation Before September 11, 2001

Prior to September 11, the federal government relied primarily on four statutes<sup>122</sup> for prosecuting hoax crimes relating to weapons of mass destruction.<sup>123</sup>

#### 1. 18 U.S.C. § 2332a

Very little has been written about the applicability of the first of these four statutes, 18 U.S.C. § 2332a (“Use of certain weapons of mass destruction”) to hoax crimes.<sup>124</sup> The offense was codified as part of the “Violent Crime Control and Law Enforcement Act of 1994,”<sup>125</sup> a sweeping Act intended to promote police recruitment and training and encourage new programs and technologies to assist the government in the prevention of crime.<sup>126</sup> Section 2332a provides remedies for the “use, threatened use, or attempted use, of a weapon of mass destruction.”<sup>127</sup>

121. *Evans*, 504 U.S. at 291 (1992) (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547-54 (1985)). Although this statement by Justice Thomas preceded *Lopez*, there has been no clear indication that his language in *Evans* is an aberration or that he has changed his position in relation to the federalism concerns implicit in both *Lopez* and *Evans*.

122. 18 U.S.C. § 2332a (2002); 18 U.S.C. § 876 (2002); 18 U.S.C. §§ 175-78 (2002); 18 U.S.C. § 229 (2002).

123. See, e.g., *United States v. Wise*, 221 F.3d 140, 157 (5th Cir. 2000) (upholding the conviction of defendants for knowingly and intentionally threatening, via email, to use weapons of mass destruction in violation of 18 U.S.C. § 2332a); *United States v. Leahy*, 169 F.3d 433, 433 (7th Cir. 1999) (sustaining the defendant’s conviction for “possession of a toxin for use as a weapon” in violation of 18 U.S.C. § 175(a)); *United States v. Turner*, 960 F.2d 461, 463 (5th Cir. 1992) (affirming the conviction of Turner for delivering a written communication containing a threat to the U.S. Postal Service in violation of 18 U.S.C. § 876).

124. See, e.g., Kellman, *supra* note 25, at 466 (noting that it is not clear whether § 2332a applies to hoax crimes); see also Heather A. Dagen, Comment, *Bioterrorism: Perfectly Legal*, 49 CATH. U. L. REV. 535, 539 (2000) (noting that recent anti-terrorism laws still have many gaps).

125. Pub. L. No. 103-322, 108 Stat. 1796 (1994).

126. *Id.* § 10002.

127. 18 U.S.C. § 2332a (2002). Congress made minor amendments to this section in 1996, see Violent Crime Control and Law Enforcement Act of 1994, § 511(c), Pub.

Section 2332a contains two distinct provisions. Subsection (a) pertains to offenses involving weapons of mass destruction within the United States or against a United States national.<sup>128</sup> This subsection applies to any person who “uses, threatens, or attempts or conspires to use a weapon of mass destruction.”<sup>129</sup> When the attack is against any person within the United States, the statute explicitly requires that the offense “affect interstate or foreign commerce.”<sup>130</sup> The statute also applies when the attack affects property “owned, leased or used by the United States or by any department or agency of the United States, whether the property is within or outside of the United States.”<sup>131</sup> Subsection (b) applies to any U.S. national who uses, threatens, attempts, or conspires to use a weapon of mass destruction “without lawful authority”<sup>132</sup> outside the United States.<sup>133</sup> Both subsections carry a maximum sentence of life imprisonment or, if any victim dies, capital punishment.<sup>134</sup>

Since its implementation, § 2332a has been used in only a handful of cases,<sup>135</sup> most famously in the trial of the Oklahoma City bomber, Timothy McVeigh.<sup>136</sup> Prior to the anthrax scares of 2001, the

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L. No. 104-132, § 725, 11 Stat. 1214, 1300 (1996), Pub. L. No. 104-294, § 605(m), 110 Stat. 3488, 3510 (1996); in 1998, *see* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 105-277, § 201(b)(1), 112 Stat. 2681 (1998); and in 2002, *see* Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, § 231(d)(1), 116 Stat. 594, 662 (2002).

128. 18 U.S.C. § 2332a(a).

129. *Id.*

130. *Id.* at (a)(2).

131. *Id.* at (a)(3).

132. 18 U.S.C. § 2332a(b).

133. *Id.*

134. *Id.* at (a), (b).

135. Currently, appellate courts have addressed only twelve claims involving a charge under § 2332a. *See* United States v. Wise, 221 F.3d 140, 147 (5th Cir. 2000) (charging defendants with sending threatening e-mails to the FBI); United States v. Khalil, 214 F.3d 111, 116 (2d Cir. 2000) (charging defendants with threatening to detonate a bomb in political protest of affairs between Israel and Palestine); United States v. McVeigh, 153 F.3d 1166, 1176 (10th Cir. 1998) (charging defendant with destruction of the Alfred P. Murrah Federal Building in Oklahoma City); United States v. Viscome, 144 F.3d 1365, 1367-68 (11th Cir. 1998) (charging defendant with placing a bomb on federal grounds); United States v. Polk, 118 F.3d 286, 291 (5th Cir. 1997) (charging defendant with attempting to destroy an IRS building); United States v. Bin Laden, 160 F. Supp. 2d 670, 671 (S.D.N.Y. 2001) (charging defendant with “participating in a global terrorist conspiracy”); United States v. Nichols, 132 F. Supp. 2d 931, 932 (D. Colo. 2001), *aff’d*, 38 Fed. Appx. 534 (10th Cir. 2002) (charging defendant with conspiring to destroy the Alfred P. Murrah Federal Building in Oklahoma City); United States v. Slaughter, 116 F. Supp. 2d 688, 689 (W.D. Va. 2000) (charging defendant with sending hoax anthrax letters in the mail); United States v. Yousef, 925 F. Supp. 1063, 1065 (S.D.N.Y. 1996) (charging defendants with attempting to destroy aircraft in foreign air commerce).

136. *See* United States v. McVeigh, 940 F. Supp. 1571 (D. Colo. 1996), *aff’d sub nom.* United States v. Nichols, 169 F.3d 1255, 1260 (10th Cir. 1999) (affirming conviction of Timothy McVeigh under § 2332a(a)(2)-(3)); *see also* Stephen Jones &



government prosecuted hoaxsters sparingly under the statute.<sup>137</sup> This policy changed, however, after the outbreak of anthrax in Florida and Connecticut and the ensuing wave of anthrax hoaxes. Subsection (a) of the statute is now becoming a major tool for federal prosecutors seeking to punish hoax pranksters.<sup>138</sup>

Section 2332a has only recently come into frequent use, however; consequently, the extent and nature of problems associated with it remain unclear. The statute has not yet been challenged on First Amendment<sup>139</sup> or due process grounds and was held to be constitutional as applied in the lone federal district court case in which the statute's constitutionality was challenged on Commerce Clause grounds.<sup>140</sup> Likewise, the statutory requirement that the use, or potential use, of a weapon of mass destruction affect interstate commerce has been upheld even where the threat was conveyed via e-mail.<sup>141</sup>

*United States v. Slaughter*,<sup>142</sup> however, provides an interesting example of the limitations of the statute. In *Slaughter*, a prison inmate sent a threatening letter containing a white powder designed to mimic anthrax to the deputy state prosecutor who was responsible for his incarceration.<sup>143</sup> The United States District Court for the Western District of Virginia set aside the defendant's conviction for

Jennifer Gideon, *United States v. McVeigh: Defending the "Most Hated Man in America"*, 51 OKLA. L. REV. 617 (1998) (chronicling the *McVeigh* case from the perspective of defense counsel).

137. See, e.g., Bill Wallace, *Hayward Man Charged in Anthrax Scare: Hoax Call from Packing Company Where He Worked in Newark*, S.F. CHRON., Jan. 1, 1999, at A13 (documenting the first anthrax hoax in northern California and the hoaxster's subsequent charge under § 2332a); David Rosenzweig, *Accountant Fined for Anthrax Hoax*, L.A. TIMES, July 22, 1999, at B3 (covering the trial and sentencing of Harvey Craig Spelkin for perpetrating an anthrax hoax to avoid an appearance in bankruptcy court). Prior to the Spelkin case, it was not clear whether § 2332a applied to hoaxes at all. See *id.* (explaining that Spelkin's attorneys argued that the law was not intended to apply to hoaxes).

138. See, e.g., Rebecca Carr, *The Anthrax Scare: Hoaxes Are Rattling a Nation; Pranksters Will Be Punished*, AUSTIN AM. STATESMAN, Oct. 17, 2001, at A6 (listing a variety of defendants charged with threatening to use a weapon of mass destruction for perpetrating anthrax hoaxes); see also *Anthrax Hoax*, BROADCAST NEWS, Jan. 29, 2002 (reporting the conviction of Robert Gibson on the charge of threatening to use a weapon of mass destruction for sending envelopes with white powder, claiming they were contaminated with anthrax, to Home Depot stores, apparently in retaliation for being fired from the store the year before), available at 2002 WL 10951215.

139. U.S. CONST. amend. I (providing that "Congress shall make no law . . . abridging the freedom of speech").

140. See *McVeigh*, 940 F. Supp. at 1575-77 (reasoning that the consequences of the defendant's attack would range far beyond local interests and therefore had the requisite impact on interstate commerce).

141. See *Wise*, 221 F.3d at 150 (upholding indictment for violation of § 2332a).

142. 116 F. Supp. 2d 688 (W.D. Va. 2000).

143. *Id.* at 689-91.

threatening to use a weapon of mass destruction on the ground that the defendant's letter would not affect a "tangible component of interstate commerce."<sup>144</sup> The court reasoned that the letter did not directly affect interstate commerce because it was directed toward a person rather than toward a business or "other obvious component of interstate commerce,"<sup>145</sup> and that no concrete evidence could be shown that the deployment of federal agents to deal with the outbreak of anthrax would deplete the assets of the federal government.<sup>146</sup>

The court's ruling in *Slaughter* reveals a potential weakness in the use of § 2332a. Where the threatened use of a weapon of mass destruction is directed toward a person inside a single state, the threat may not involve sufficient federal resources to satisfy the statute's commerce requirement.<sup>147</sup> This hidden shortcoming may confer leverage to the defendant, in some instances allowing him or her to plea bargain the more severe charge of threatening the use of a weapon of mass destruction down to a lesser charge.<sup>148</sup> At a minimum, federal prosecutors must search for some connection

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144. *Id.* at 692.

145. *See id.* (noting that additional threats against the Kentucky Educational Television station also would not have affected a component of interstate commerce).

146. *See id.* (explaining that the government failed to show a likelihood that interstate commerce would be affected by a military response to an actual anthrax threat).

147. *But see id.* at 693 (limiting the court's holding to the narrowness of the facts before it due to the lack of evidence presented by the government). The court further stated:

It is possible that the use of a weapon of mass destruction, unlike other crimes, would be of such magnitude that every instance would require the response of specially trained government agents being dispatched across state lines to address the problem. In that case, the effect on interstate commerce caused by the agents' emergency travel would be a more direct result of the criminal activity than a federal agent that crossed state lines merely to investigate a crime.

*Id.* Given the cost of investigation and preventative treatment for anthrax-related hoaxes demonstrated since the court's ruling in *Slaughter*, the court's dicta in this case may prove more persuasive in the long run than its actual holding.

148. *See, e.g.,* David Harper, *Anthrax Hoax Count Reduced*, TULSA WORLD (Tulsa, Okla.), Mar. 2, 2002, at A10 (reporting the story of an anthrax hoaxster whose charge of threatening to use a weapon of mass destruction was reduced to misdemeanor harassing a witness). The defendant in this case, Dustin Wade Limberg, attempted to mail his girlfriend a note with the phrase, "You got anthrax now," in an envelope containing sugar. *Id.* Prosecutors initially charged Limberg with violating § 2332a, but later reduced the charges, at least in part because of the difficulty of showing an impact on interstate commerce. *See id.* (quoting U.S. Attorney David O'Meilias as admitting that proving Limberg had affected interstate commerce "might have been problematic").

between the hoaxster's conduct and interstate commerce to justify the use of the statute.<sup>149</sup>

## 2. 18 U.S.C. § 876

Many anthrax hoaxsters have been prosecuted under the second of the four statutes, 18 U.S.C. § 876 ("Mailing Threatening Communications").<sup>150</sup> This statute provides that any person who "deposits or causes to be delivered"<sup>151</sup> any communication containing a "threat to injure the person of the addressee or of another"<sup>152</sup> shall be imprisoned for up to five years or fined a maximum of \$1,000, or both.<sup>153</sup> The statute requires only that the government show that the defendant wrote a threatening letter and knowingly caused the letter to be forwarded by the U.S. Postal Service.<sup>154</sup> The offender need not

149. See, e.g., William J. Gorta, *Powder Hoax May Mean Life Sentence*, N.Y. POST, Oct. 20, 2001, at 6 (reporting the prosecution's justification of a charge under § 2332a on the theory that the defendant's hoax affected interstate commerce by forcing a bank to close). The defendant had placed baby powder in a co-worker's pay envelope as a practical joke, only to be charged with threatening the use of a weapon of mass destruction after the co-worker opened the envelope and spilled some of the powder in a nearby bank. *Id.*

150. See, e.g., *Ex-Postal Worker Pleads Guilty*, RICHMOND TIMES-DISPATCH (Va.), Jan. 27, 2002, at B6 (covering the conviction of Sharon Ann Watson-Collins for sprinkling baby powder inside a piece of bulk mail); Karl Fischer, *Anthrax Hoax Case Proceeds in L.A.*, CONTRA COSTA TIMES (Walnut Creek, Cal.), Jan. 10, 2002, at A3 (discussing the indictment of Israel Rodriguez for mailing a letter containing baking soda to the Internal Revenue Service); *Grand Jury Indicts Man in Anthrax Mail Hoax*, HOUSTON CHRON., Nov. 8, 2001, at 24A (reporting the circumstances surrounding the arrest of William O. Holden for sending a fake anthrax package out of a local Mail Boxes, Etc. store); J.M. Lawrence, *Accused Anthrax Hoaxsters Indicted*, BOSTON HERALD, Nov. 2, 2001, at 6 (reporting the indictment of a prison inmate who sent hoax letters containing a white powder to several people); Tim McGlone, *FBI Charges Man with Using Mail in Anthrax Hoax: Unhappy-Customer Query Led to Man's Arrest*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk, Va.), Nov. 9, 2001, at B9 (discussing the story of Clifton Gilchrist Jr., who was arrested for sending a fake anthrax letter to an automobile insurance salesman he did not like); *Sacramento Man Is Accused of Perpetrating Anthrax Hoax*, SAN DIEGO UNION-TRIB., Nov. 16, 2001, at A12 (reporting the arrest of Mark Van Pelt for enclosing "pinkish-brown powder" and a note stating "Gotcha!" with his phone bill payment); Jeff Shields, *Student Accused in Anthrax Hoax: Powdered Letter Sent to Romantic Rival*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Nov. 22, 2001, at 1B (focusing on the story of Melinda Rosemarie Smith, arrested for sending hoax anthrax letters to intimidate her romantic competitor); *State Briefs*, CHARLESTON GAZETTE & DAILY MAIL (Charleston, W. Va.), Nov. 10, 2001, at 7A (recounting the arrest of Burley R. Bragg for sending threatening letters referencing anthrax to the Department of Veterans Affairs in Huntington), available at 2001 WL 6698864; *Trial Set for April 9 in Anthrax Hoax Case*, HOUSTON CHRON., Feb. 5, 2002, at 18A.

151. 18 U.S.C. § 876.

152. *Id.*

153. See *id.* (differentiating this offense from delivering any communication containing a threat to kidnap or injure a person made with the intent to extort money or some other thing of value, which carries a maximum penalty of twenty years in prison).

154. See *United States v. Turner*, 960 F.2d 461, 463 n.2 (5th Cir. 1992) ("A person violates 18 U.S.C. § 876 by writing a threatening letter and knowingly causing it to be

have authored the threatening communication,<sup>155</sup> nor must he or she have been able actually to carry out the threat or even have intended to do so.<sup>156</sup> Courts continue to disagree, however, about whether the statute contains an implied intent requirement, namely that the offender intended to threaten another.<sup>157</sup>

The obvious problem with § 876 is its specificity—it applies only to situations in which the U.S. Postal Service is involved,<sup>158</sup> making it generally less applicable than § 2332a. While the statute has been a useful tool in combating some recent anthrax hoaxes,<sup>159</sup> § 876 has little value where the hoax is not in the form of a letter. The statute is not intended to address hoax crimes and, therefore, is unlikely to be of assistance to federal prosecutors in dealing with future hoaxes.

A second problem with § 876 is its mens rea requirement, which makes it necessary that the perpetrator knowingly commit the act of mailing threatening communications.<sup>160</sup> This predicament came to the forefront in the trial of Kinley Gregg, the first person to go to trial on charges related to an anthrax hoax after September 11.<sup>161</sup> Gregg

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deposited in the United States mails.”).

155. See *United States v. Davis*, 926 F.2d 969, 971 (10th Cir. 1991) (explaining that, if authorship were required, an individual could avoid prosecution under § 876 by having someone else write a threatening letter).

156. See *United States v. King*, 122 F.3d 808, 810 (9th Cir. 1997) (holding that the government need not establish that a defendant reasonably anticipates success from his or her threat).

157. Compare *United States v. Twine*, 853 F.2d 676, 680 (9th Cir. 1988) (holding that the statute requires the specific intent by the accused to threaten another, because the term “knowingly” in the statute implies more than a “transgression of an objective standard of acceptable behavior”), with *United States v. Francis*, 164 F.3d 120, 121-22 (2d Cir. 1999) (stating that there is no evidence that the legislature intended § 876 to be a specific intent crime, and noting that every other circuit court besides the Ninth Circuit has held that the offense is not a specific intent crime).

158. Threats sent through other channels of interstate commerce, such as e-mail, can be prosecuted under 18 U.S.C. § 875(c). 18 U.S.C. § 875(c) (2000) (“Interstate Communications”); see, e.g., Randy Ellis, *Student Pleads Guilty in Anthrax Hoax*, DAILY OKLAHOMAN, Apr. 5, 2002, at 1A (reporting the guilty plea of Mohammad Yaseen Haider for sending anthrax threats to a former love interest through e-mail); *Newsbytes Security Week in Review*, NEWSBYTES NEWS NETWORK, Feb. 1, 2002 (noting the guilty plea of a Columbus, Ohio woman for sending threatening e-mails to President Bush), available at 2002 WL 3447541.

159. See, e.g., Chapman, *supra* note 14, at 1B (reporting the story of Richard Gabrich, who sent cornstarch in an envelope to a friend as a practical joke); *Postal Worker Admits Anthrax Prank*, CHI. SUN-TIMES, Feb. 6, 2002, at 18 (describing the case of postal worker Clarence Lindsey for scrawling, “ANTRAX INCLOSED [sic],” on a package); see also Darlene Superville, *Anthrax ‘Jokes’ Are Taken Very Seriously*, MILWAUKEE J. SENTINEL, Nov. 4, 2001, at 12A (providing a cursory review of recent anthrax hoax charges, including charges levied against Murray State University students Amy Wood and Erin Creighton for mailing a letter with powdered sugar and pseudo-Arabic calligraphy to a friend).

160. 18 U.S.C. § 876 (prohibiting individuals from “knowingly” depositing threatening mail).

161. See Cheryl W. Thompson, *Maine Woman Acquitted in 1st Anthrax Hoax Trial*,

was charged with mailing a threatening communication after sending an envelope laden with table salt to a friend as a practical joke.<sup>162</sup> Some of the salt seeped out of the envelope at a New Hampshire post office, leading to federal charges against Gregg.<sup>163</sup> She was eventually acquitted of the charges, due to the failure of the prosecution to prove that she intended the communication to be a threat.<sup>164</sup> While Gregg benefited from particularly helpful facts (she told her friend in advance that she was sending the envelope,<sup>165</sup> the post office worker who discovered the envelope did not panic,<sup>166</sup> and the substance was never even analyzed),<sup>167</sup> the acquittal was nonetheless perceived in the media as a blow to the government's public crusade against anthrax hoaxes.<sup>168</sup>

### 3. 18 U.S.C. § 175(a)

The third of the four statutes for prosecuting hoax crimes, the "Biological Weapons Anti-Terrorism Act of 1989," 18 U.S.C. § 175(a), contains a provision stating that any person who "knowingly develops, produces, stockpiles, transfers, acquires, retains or possesses any biological agent, toxin, or delivery system for use as a weapon . . . or attempts, threatens, or conspires to do the same"<sup>169</sup> will be fined, imprisoned for life or any term of years, or both.<sup>170</sup>

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WASH. POST, Feb. 22, 2002, at A3 (reviewing the history of Kinley Gregg's trial and subsequent acquittal, stating that legal experts are uncertain how successful the Justice Department can be in holding true to its "pledge to throw the book at those who commit anthrax hoaxes").

162. See *id.* (detailing Gregg's statements that she selected salt because she thought it would be obvious to anyone that it was salt, rather than "something that would hang in the air and get into someone's lungs").

163. See *id.* (stating that the salt leaked onto a postal worker at the post office, but the worker did not panic and the office was not evacuated).

164. See *id.* (attributing the jury's decision to acquit to the government's failure to take the case seriously).

165. See Cheryl W. Thompson, *Envelopes Full of Legal Controversy; Anthrax Hoax Cases Stir Debate on Rights and Responsibilities*, WASH. POST, Dec. 25, 2001, at A1 (noting that Gregg told a friend she was "sending her something amusing").

166. See Thompson, *supra* note 161, at A3 (quoting a juror as saying that the prosecution's argument was undercut by the fact that the postal officer who discovered the envelope did not "freak out").

167. See *id.* (claiming that the table salt Gregg enclosed in the envelope had still not been tested by the day of her acquittal).

168. See *id.* (describing the Gregg verdict as a "setback for the Justice Department's efforts to severely punish" anthrax hoaxsters).

169. Biological Weapons Anti-Terrorism Act of 1989, 18 U.S.C. § 175(a) (2000).

170. *Id.*

This little-used statute<sup>171</sup> has never been employed to prosecute a person for threatened possession of a biological agent.<sup>172</sup> Moreover, § 175(a) presents two disadvantages for prosecutors in comparison with § 2332a: first, the statute requires that the offender specifically intends that the threatened agent will be used as a weapon;<sup>173</sup> second, the death penalty is not authorized as a punishment for this crime.<sup>174</sup>

#### 4. 18 U.S.C. § 229

The last of the four statutes, 18 U.S.C. § 229 ("Prohibited Activities"), is part of the Chemical Weapons Convention Implementation Act ("CWCIA").<sup>175</sup> The CWCIA reflected the United States' consent to the International Chemical Weapons Convention,<sup>176</sup> and it has been analyzed primarily for its affect on commercial chemical companies.<sup>177</sup> However, § 229 of the Act—which provides for a penalty for any person who threatens to use a chemical weapon<sup>178</sup>—has never been used to prosecute an individual criminal defendant.

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171. Only three cases involving 18 U.S.C. § 175 have been decided at the appellate level. See *United States v. Leahy*, 169 F.3d 433, 435 (7th Cir. 1999) (charging defendant with possession of numerous biological toxins); *United States v. Baker*, 98 F.3d 330, 333 (8th Cir. 1996) (charging defendant with possession of ricin); *United States v. Mettetal*, No. CRIM.A. 3:96CR50034, 2000 WL 33232324, at \*2 (W.D. Va. June 16, 2000) (charging defendant with possession of ricin).

172. But see *Man Pleads Innocent in Hoax*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Oct. 30, 2001, at 7A (reporting a grand jury indictment against Terry L. Olson of Price, Utah for "threatening to use a biological weapon and giving false information"). It is unclear whether Olson was indicted for violating § 175 or § 2332a. See also Richard Brooks, *Man Accused in Anthrax Scare*, PRESS-ENTERPRISE (Riverside, Cal.), Nov. 28, 2001, at B10 (reporting the arrest of Antonio Miguel Flores of San Bernardino, California on charges of "threatening the transfer of a biological agent for use as a weapon," but stating that the maximum penalty for this offense is five years' imprisonment).

173. See 18 U.S.C. § 175(a) ("Whoever knowingly develops [a] . . . delivery system for use as a weapon . . . or attempts, threatens, or conspires to do the same . . .") (emphasis added).

174. See *id.* (listing punishment for violating § 175(a) as a fine or imprisonment for life or any term of years, or both).

175. See generally Barry Kellman, *The Advent of International Chemical Regulation: The Chemical Weapons Convention Implementation Act*, 25 J. LEGIS. 117 (1999) (explaining the history and significance of the Chemical Weapons Convention Implementation Act).

176. See *id.* at 117 (stating that the Act was a result of the Omnibus Appropriations Act of 1998).

177. See *id.* at 125 ("This discussion examines six aspects of the CWCIA with primary focus on its implications for the commercial chemical industry . . .").

178. See 18 U.S.C. § 229A (2000) (providing for criminal and civil penalties, with the criminal penalties including a fine or imprisonment for any term of years, or both). The death penalty or life in prison are possible punishments if the violation results in the death of another person. *Id.*

*C. Federal Hoax Crime Legislation After September 11, 2001*

In the aftermath of the events of September 11, both the Senate and the House of Representatives sponsored bills addressing hoax crimes. Three bills, S. 1658,<sup>179</sup> S. 1666,<sup>180</sup> and S. 1719,<sup>181</sup> were introduced in the Senate<sup>182</sup> and one bill, H.R. 3209,<sup>183</sup> was passed by the House of Representatives<sup>184</sup> of the 107th Congress; however, none was enacted prior to adjournment of the 107th Congress.<sup>185</sup>

Similar bills were introduced in the 108th Congress. S. 22<sup>186</sup> was referred to the Senate Judiciary Committee in January 2003,<sup>187</sup> and H.R. 1678<sup>188</sup> was referred to the House Judiciary Committee in April 2003.<sup>189</sup> Each of these latter bills proposed to create a new section of the U.S. Code that would address false or terrorist information and hoaxes.<sup>190</sup>

*1. 107th Congress*

*a. S. 1658*

In November 2001, Senator Charles Schumer introduced the first of the Senate bills, S. 1658, the "Anti-Hoax Terrorism Act of 2001."<sup>191</sup> This legislation proposed a criminal penalty for *knowingly* engaging in conduct "likely to impart the false impression that activity is or will

179. Anti-Hoax Terrorism Bill of 2001, S. 1658, 107th Cong. (2001).

180. Anti-Terrorist Hoax and False Report Act of 2001, S. 1666, 107th Cong. (2001).

181. Anti-Hoax Terrorism Act of 2001, S. 1719, 107th Cong. (2001).

182. 147 CONG. REC. S11,611 (daily ed. Nov. 8, 2001) (referring S. 1658 to the Senate Judiciary Committee); *id.* at S11,612 (daily ed. Nov. 8, 2001) (referring S. 1666 to the Senate Judiciary Committee); 147 CONG. REC. S12,001 (daily ed. Nov. 16, 2001) (referring S. 1719 to the Senate Judiciary Committee).

183. Anti-Hoax Terrorism Act of 2001, H.R. 3209, 107th Cong. (2001).

184. 147 CONG. REC. H9309 (daily ed. Dec. 12, 2001) (recording passage of H.R. 3209 in the House by a vote of 423-0).

185. *See* Anti-Hoax Terrorism Bill of 2001, S. 1658, 107th Cong. § 2 (2001) (proposing "False Information and Hoaxes" as the title for the new statutory provision); S. 1666 § 2 (naming the proposed amendment "Terrorist Hoaxes and False Information"); S. 1719 § 2 (titling the proposed amendment "False Information and Hoaxes"); H.R. 3209 § 2 (proposing title for new statutory provision as "False Information and Hoaxes").

186. Justice Enhancement and Domestic Security Act of 2003, S. 22, 108th Cong. (2003).

187. 149 CONG. REC. S35 (daily ed. Jan. 7, 2003) (referring S. 22 to the Senate Judiciary Committee).

188. The Anti-Hoax Terrorism Act of 2003, H.R. 1678, 108th Cong. (2003).

189. 149 CONG. REC. H2938 (daily ed. Apr. 8, 2003) (referring H.R. 1678 to the House Judiciary Committee).

190. *See* S. 22 (creating 18 U.S.C. § 881, "False Information and Hoaxes"); H. 1678 (creating 18 U.S.C. § 1037, "False Information and Hoaxes").

191. *See* S. 1658, 107th Cong. (2001) (listing the introduction of the bill on November 8, 2001).

take place that violates [S]ection[s] 175, 229, 831, or 2332a, [and] . . . may reasonably be expected to be believed to cause an emergency response by governmental agencies . . . .”<sup>192</sup> The bill called for a fine or a five-year prison term, or both, and reimbursement for any expenses incurred as a result of the investigation of the offense.<sup>193</sup> It is unclear whether the mens rea requirement was intended to apply to the perpetrator or the victim.

*b. S. 1666*

On the same day that Senator Schumer introduced S. 1658, Senator Patrick Leahy introduced the “Anti-Terrorist Hoax and False Report Act of 2001,”<sup>194</sup> S. 1666.<sup>195</sup> The Act substantially resembled S. 1658, with one important exception: the bill required that an offender of the proposed statute both *knowingly and maliciously* impart false information under circumstances “likely to cause a Federal, State, or local”<sup>196</sup> response to the purported violation of §§ 175, 229, 2332a, or 831.<sup>197</sup> In addition, S. 1666 provided restitution for individual victims of the hoax, rather than creating automatic civil liability.<sup>198</sup>

*c. S. 1719*

Introduced a week after S. 1658 and S. 1666, S. 1719, the “Anti-Hoax Terrorism Act of 2001,”<sup>199</sup> was nearly identical to S. 1658. Other than placing the new statute in Chapter 47 of the U.S. Code (“Telephones, Telegraphs, and Radiotelegraphs”),<sup>200</sup> the only substantial difference was that it required the mens rea of “*intent* to convey false or misleading information”<sup>201</sup> rather than merely *knowing* that the information is false, which was the requirement under S.

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192. *Id.* § 2(a).

193. *Id.*

194. S. 1666, 107th Cong. (2001). The title of this bill is referenced deliberately because of its dissimilar nature to the proposed titles for the other bills addressing this issue.

195. S. 1658; S. 1666. S. 1658 was introduced by Senator Schumer and S. 1666 was introduced by Senator Leahy, both on November 8, 2001.

196. S. 1666, § 2(a).

197. *Id.*

198. *Id.*

199. See S. 1719, 107th Cong. (2001) (listing the introduction of the bill by Senator Diane Feinstein of California on November 16, 2001).

200. Compare S. 1719, § 2(a) (“Chapter 47 of title 18, United States Code, is amended by inserting after section 1036 [internal citation omitted] the following . . .”), with Anti-Hoax Terrorism Bill of 2001, S. 1658, 107th Cong. § 2(a) (2001) (“Chapter 41 of title 18, United States Code, is amended by inserting after section 880 [internal citation omitted] the following . . .”).

201. S. 1719, § 2(a) (emphasis added).



1658.<sup>202</sup> Accordingly, the bill appeared to be a compromise between S. 1658 and S. 1666, replacing the mens rea requirement of S. 1658 and the stringent scienter requirement of S. 1666 with less onerous requirements.

*d. H.R. 3209*

H.R. 3209, a bill nearly identical to S. 1658, was passed by the House of Representatives of the 107th Congress but was never enacted. H.R. 3209, the “Anti-Hoax Terrorism Act of 2001,”<sup>203</sup> was reintroduced by Lamar Smith in the 108th Congress as H.R. 1678.<sup>204</sup>

*2. 108th Congress*

*a. S. 22*

In January 2003, Senator Thomas Daschle introduced S. 22, the “Justice Enhancement and Domestic Security Act of 2003.”<sup>205</sup> Much of S. 22 resembles S. 1658.<sup>206</sup> S. 22, in its proposed amendment to 18 U.S.C. § 881(a)(1), prohibits any person from “imparting or conveying or causing to be imparted or conveyed false information,”<sup>207</sup> *knowing* the information to be false, regarding any attempt to commit an act that would be a crime under 18 U.S.C. §§ 175, 229, 831, or 2332a, and where such information may be reasonably believed.<sup>208</sup> S. 22 does not require that the hoaxster impart false information maliciously, but it does distinguish between those done in jest and those done maliciously.<sup>209</sup>

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202. Anti-Hoax Terrorism Bill of 2001, S. 1658, 107th Cong. § 2(a) (2001).

203. See 147 CONG. REC. H9309 (daily ed. Dec. 12, 2001) (noting passage of the bill on December 12, 2001 by a vote of 423-0).

204. See *infra* Part II.C.2.b.

205. S.22, 108th Cong. § 1403(a) (2003).

206. Compare *id.* (defining unlawful acts as knowingly imparting or conveying false information of any act that would be a crime under 18 U.S.C.A. § 175, or knowingly or intentionally transferring or distributing any device or material resembling a weapon of mass destruction), with S. 1658 (defining a criminal violation as knowingly engaging in any conduct that violates 18 U.S.C.A. § 175, or that may reasonably be expected to cause an emergency response by government agencies).

207. S. 22, § 1403(a).

208. *Id.* (proposing an amendment that would create 18 U.S.C. § 881(a)(1) in Chapter 41).

209. *Id.* (comparing proposed amendments to § 881(a)(1) to (b)(2)).

S. 22 also expands on the 107th Congress's anti-hoax proposals.<sup>210</sup> Unlike the previous proposals, § 1403(a)(2) of S. 22 prohibits any person from transferring or distributing any device or material *knowing or intending* that the device or material resembles a nuclear, chemical, or biological weapon or other weapon of mass destruction.<sup>211</sup> This proposal is constrained to situations in which it may be reasonably believed that the material(s) may be involved in the attempt or commission of a crime under §§ 175, 229, 831, or 2332a.<sup>212</sup>

### *b. H.R. 1678*

In April 2003, Representative Lamar Smith reintroduced H.R. 3209 of the 107th Congress as H.R. 1678, the "Anti-Hoax Terrorism Act of 2003."<sup>213</sup> H.R. 1678 prohibits conduct that intends to convey false or misleading information, in circumstances in which this information may reasonably be believed and concerns an activity that violates §§ 175, 229, 831, or 2332a.<sup>214</sup> Akin to S. 22, H.R. 1678 does not require that the hoaxster impart false information maliciously;<sup>215</sup> however, H.R. 1678 requires that the hoaxster convey false or misleading information *intentionally*.<sup>216</sup>

Regardless of which bill or a successor, if any, is ultimately enacted, states must reconstitute their legislation to deal with any gaps in federal statutory law.

## II. STATE LEGISLATION

### *A. Constitutional Issues and Challenges Facing Hoax Crime Legislation*

Although states can justify creating their own hoax crime legislation under their traditional police powers, they must be mindful of drafting legislation that meets basic standards of

210. Compare *id.* (amending 18 U.S.C. § 881(a)(1) to further protect against false information), with Anti-Hoax Terrorism Bill of 2001, S. 1658, 107th Cong. § 2(a) (2001), Anti-Terrorist Hoax and False Report Act of 2001, S. 1666, 107th Cong. (2001) (omitting the intent element more clearly pronounced in the S. 22 amendment), and Anti-Hoax Terrorism Act of 2001, S. 1719, 107th Cong. (2001) (including a provision criminalizing transferring or distributing a hoax device).

211. S. 22, § 1403(a) (amending Title 18, U.S. Code to include § 881(a)(2)).

212. *Id.*

213. H.R. 1678, 108th Congress (2003).

214. See *id.* § 2(a) (creating § 1037 in Chapter 47 of Title 18 of the U.S. Code).

215. Compare S. 22, § 1403(a) (prohibiting a person from knowingly conveying false information), with H.R. 1678 108th Cong. § 2 (a) (noting that neither bill requires malicious intent).

216. H.R. 1678, § 2(a).

fundamental fairness and that will withstand constitutional scrutiny.<sup>217</sup> Significant due process concerns will likely arise if a state decides to draft a hoax crime bill without considering the problems with criminalizing equally actions done in jest and those done with malice.<sup>218</sup> In *State v. Hamilton*,<sup>219</sup> for example, the Nebraska Supreme Court held that, without such a differentiation, a hoax statute violates the Due Process Clause.<sup>220</sup> To preempt any due process challenges, state legislatures must consider separating hoax crime statutes into three specific *acti rei*: false reports, hoaxes, and terroristic threats.<sup>221</sup> These statutes must further divide the crimes by incorporating into each offense different *mens rea* standards, distinguishing between hoaxes perpetrated in jest and those done with malice.<sup>222</sup>

The most salient due process challenges to future hoax crime legislation will likely emerge under the void-for-vagueness doctrine,<sup>223</sup> which requires that a statute reasonably inform the citizenry of precisely what it is prohibiting.<sup>224</sup> Challenges under this doctrine are common when dealing with the emergence of new criminal

217. See *infra* Part IV.C.4 (explaining why states must focus particularly on unduly vague and overly broad language in hoax statutes).

218. See *State v. Hamilton*, 340 N.W.2d 397, 398-99 (Neb. 1983) (holding that a statute may be too vague if it does not distinguish threats made in jest from those made in seriousness) (emphasis added).

219. *Id.*

220. See *id.* (explaining that the use of the word “likely” in the statutory sentence “threatens to commit any crime *likely* to result in death or serious physical injury to another” is too vague to allow for any interpretation of what qualifies as a threat, especially because it provides no distinction between threats made as jokes and those made in seriousness) (emphasis added).

221. See *infra* Part V.B (recommending separation of state legislation into false reports, hoaxes, and terroristic threats).

222. See *infra* Part V.C (discussing the division of each offense to include the recommended *mentes rea*).

223. For a recent statement on the void-for-vagueness doctrine, see *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001), which cites numerous decisions in which the Supreme Court held criminal statutes “void for vagueness.” See also *United States v. Harriss*, 347 U.S. 612, 617 (1954) (“The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.”); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (“No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.”); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (declaring unconstitutional a criminal statute that was not “sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties”).

224. See *Rogers*, 532 U.S. at 457 (noting specifically that the Supreme Court has frequently acknowledged the “basic principle that a criminal statute must give fair warning of the conduct that it makes a crime”); see also *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) (explaining that a “greater deprivation of the right to fair notice [is produced] . . . where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical ‘void for vagueness situation.’”).

regulations.<sup>225</sup> To avoid invalidation, legislatures must specifically define the actus reus and mens rea elements of each offense.

### B. State Hoax Crime Statutes Before September 11, 2001

While the federal government has assumed a high-profile role in prosecuting some recent anthrax hoaxsters,<sup>226</sup> hoax crimes have fallen primarily under the rubric of state control.<sup>227</sup> Unlike federal legislation, which is restricted to regulating interstate commerce and protecting national interests, states may criminalize a broad range of hoaxes, from the innocuous to the dangerous, with a variety of penalties and regulatory schemes.<sup>228</sup>

Historically, states punished *pranks* that disrupted public functions as misdemeanors through state disorderly conduct or false alarm statutes,<sup>229</sup> and punished *threats* that disrupt public functions or intimidate private victims through terroristic threat statutes.<sup>230</sup> Recently, several states have created hoax crime laws that address hoaxes specifically, rather than as an incidental part of a public disruption or private threat.<sup>231</sup> Prosecutors have used each of these types of statutes to some effect against recent anthrax hoaxsters.<sup>232</sup>

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225. See Brant E. Poling, *Stalking: Is the Law Hiding in the Shadows of Constitutionality?*, 23 CAP. U. L. REV. 279 (1994):

The Supreme Court's vagueness doctrine is one of the principal tests to determine if a statute is constitutional. A criminal statute is void for vagueness under the Due Process Clause of the Fourteenth Amendment if the statute fails to contain ascertainable standards of guilt. The basic principle of due process is that an enactment is void for vagueness if its prohibitions are not clearly defined. As stated by the Supreme Court: "[T]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

*Id.* at 302-03. For example, when states began to rewrite their stalking laws, several commentators and academics criticized bills that were not clear enough to reasonably inform the public about what exactly was being prohibited. *Id.*

226. See *supra* Part I (detailing stories of the prosecution of anthrax hoaxsters following September 11, 2001).

227. See *infra* Part III.B.3 (examining state statutes regulating hoax crimes).

228. See *infra* Parts III.B.1-III.B.3 (detailing state jurisdiction to prosecute a variety of hoax crimes).

229. See *infra* Part III.B.1 (discussing state prosecution of false reporting through disorderly conduct types of offenses).

230. See *infra* Part III.B.3 (relating details on state terroristic threat statutes in place before September 11, 2001).

231. See *infra* Part III.B.2 (examining state hoax statutes in existence before September 11, 2001).

232. See *infra* Parts III.B.1-III.B.3 (listing the use of state disorderly conduct, hoax,

This section of the article considers these statutes with a particular emphasis on three *actus rei*: false reports, hoaxes, and terroristic threats.

1. *False reporting: misdemeanor offenses for disruption of public functions*

Many states continue to prosecute hoax crimes through misdemeanor statutes that prohibit false reports or alarms, disorderly conduct, a combination,<sup>233</sup> or some variation of these laws, such as "menacing"<sup>234</sup> or "disrupting school function" laws.<sup>235</sup> States have used false report statutes based on the Model Penal Code to prosecute a wide range of anthrax hoaxsters, including a prisoner who mailed powder-laden envelopes to county facilities,<sup>236</sup> a city councilman who shook dust off his jacket as he entered a public building,<sup>237</sup> and college students who masqueraded as Osama bin Laden and "Anthrax" for Halloween.<sup>238</sup> In addition, sheriff's officials in Colorado have sought application of the statute to a ten-year-old boy who filled a canister with baby formula and claimed that it was anthrax.<sup>239</sup>

Under the Model Penal Code, a person is guilty of creating a false report or alarm if he or she initiates or circulates a report of an

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and terrorist threat statutes that were in place before September 11, 2001, in order to prosecute recent anthrax hoaxsters).

233. See, e.g., Steve Silverman, *Women Deny They Sent Fake Anthrax*, PANTAGRAPH (Bloomington, Ill.), Jan. 10, 2002, at A3 (reporting the charge of three Bloomington women for "disorderly conduct involving the false report of a biological contaminant").

234. See, e.g., Kelly, *supra* note 32, at B01 (chronicling state response to anthrax hoaxes through state felony and misdemeanor "menacing" statutes).

235. See, e.g., Eric Eyre, *2 Junior High Students Charged in Anthrax Hoax*, CHARLESTON GAZETTE & DAILY MAIL (Charleston, W. Va.), Oct. 25, 2001, at 1C (covering the arrest of two Kanawha County students on charges of "disturbance of schools" for perpetrating an anthrax hoax), available at 2001 WL 6696736; Jim Ross, *Miles Away, Sept. 11 Hits Home*, ST. PETERSBURG TIMES (Fla.), Jan. 1, 2002, at 1 (reporting the arrest of a Citrus High School student on a charge of disrupting a school by typing "Anthrax is here and in this school, bye now" on a school computer), available at 2002 WL 3227075.

236. See Tom Murphy, *Inmate Charged in Letter Mailing*, SYRACUSE NEWSPAPERS (N.Y.), Dec. 7, 2001, at C1 (covering the arrest of a Marcy Correctional Facility inmate on charges of falsely reporting an incident), available at 2001 WL 5578431.

237. See Slade, *supra* note 36, at B1 (explaining that Robert Niehoff, a seventy-six-year-old city councilman, faced false reporting charges after telling the secretaries at the local Borough Hall that he had gotten white powder on his clothes while collecting the mail).

238. See Teresa Killian, *Two Spartanburg, S.C., University Students Arrested for Terrorist Joke*, KNIGHT-RIDDER TRIB. BUS. NEWS (Spartanburg, S.C.), Nov. 2, 2001 (recounting how the students went to a local mall dressed in costume and threw a white substance from a Johnson & Johnson bottle at mall stores while repeatedly saying "anthrax"), available at 2001 WL 29844166.

239. See Kelly, *supra* note 32, at B01 (explaining that the boy claimed the formula was anthrax so he would be declared a hero for discovering it and school would be cancelled for the day).

impending bombing “or other crime or catastrophe,”<sup>240</sup> knowing that the report is false and is likely to cause an evacuation or public inconvenience or alarm.<sup>241</sup> Activity of this nature that is intentionally directed toward a government agency constitutes a separate offense.<sup>242</sup> Further, persons who implicate others by reporting to a law enforcement officer the existence of a public hazard, crime, offense, or incident that did not occur could be charged with the misdemeanor of making “false reports” under laws based on provisions of the Model Penal Code.<sup>243</sup>

States have prosecuted hoaxsters under disorderly conduct statutes as well.<sup>244</sup> The Model Penal Code defines disorderly conduct as engaging in “fighting or threatening,”<sup>245</sup> or creating a “hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor,”<sup>246</sup> with the purpose of creating “public inconvenience, annoyance or alarm, or recklessly creating the risk thereof.”<sup>247</sup> The Code recommends that the offense be treated as a petty misdemeanor.<sup>248</sup>

False reporting, false alarm, and disorderly conduct laws are often invoked as supplemental charges for anthrax hoaxsters accused of more serious offenses, such as terroristic threatening or threatening the use of a weapon of mass destruction.<sup>249</sup> Alternatively, these laws could be used as fallbacks should the more serious allegations fail.<sup>250</sup>

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240. MODEL PENAL CODE § 250.3 (1985).

241. See *id.* (suggesting that this offense be categorized as a misdemeanor).

242. See *id.* § 241.4 (recommending that this offense also constitute a misdemeanor).

243. *Id.* § 241.5.

244. See Mitch Martin, *Woman Upset About a Bill Admits to Anthrax Mail Hoax*, CHI. TRIB., May 15, 2002, at B3 (reporting how a woman who mailed a hoax anthrax letter to a mechanic because she was angry about her bill pleaded guilty to disorderly conduct), available at 2002 WL 2655151; see also Todd Wright, *Alleged Hoax Hits Hospital in Beverly*, BOSTON GLOBE, July 8, 2002, at B2 (noting that the police were preparing to charge a lab technician at a hospital with disorderly conduct for reporting a false robbery and attack at the hospital).

245. MODEL PENAL CODE § 250.2(1)(a) (1985).

246. *Id.* § 250.2(1)(c).

247. *Id.*

248. See *id.* § 250.2(2) (explaining that the offense is a petty misdemeanor if the “actor’s purpose is to cause substantial harm or serious inconvenience, or if he persists in disorderly conduct after reasonable warning or request to desist”).

249. See, e.g., Linda Deutsch, *One Charged with Anthrax Hoax*, AP ONLINE, Oct. 18, 2001, available at 2001 WL 29334942 (covering the story of a defendant charged with threatening to use a weapon of mass destruction, criminal threats, misdemeanor terrorism, and false reporting for creating an anthrax hoax). The defendant in the case, Dionicio Garcia, wrote a false anthrax warning on a five-gallon bucket of rotten beans and chili on the Queen Mary ship. See Anna Gorman, *Los Angeles Man Held in Anthrax Hoax Against Colleague Courts*, L.A. TIMES, Dec. 21, 2001, at B3 (stating that the bucket was discovered in a dumpster on the ship in Long Beach, California).

250. See, e.g., *Man Enters Plea in Anthrax Scare*, PRESS-ENTERPRISE (Riverside, Cal.),

The relatively light penalty scheme of these laws<sup>251</sup> has come under intense scrutiny in light of the recent anthrax scare, however, prompting many state legislators to upgrade the penalties for offenses in which hoax weapons of mass destruction are involved.<sup>252</sup>

## 2. *Hoax crimes*

Prior to September 11, only five states had enacted legislation that was specifically designed to address hoax crimes.<sup>253</sup> An example is Florida's hoax crime law, which prohibits the unlawful manufacture, possession, sale, delivery, display, use, threatened use, attempted use, or conspiracy to use a "hoax weapon of mass destruction."<sup>254</sup> Several other states, such as Colorado,<sup>255</sup> had hoax bomb statutes, but these statutes did not cover anthrax-type hoaxes.<sup>256</sup>

Although these pre-September 11 hoax crime statutes have been used to prosecute similar crimes, their specifics vary immensely, particularly in terms of their mens rea requirements.<sup>257</sup> For example, Florida mandates that the offender intend to deceive or mislead another person into believing that the hoax weapon of mass

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Jan. 25, 2002, at B06 (discussing Michael Millspaugh's nolo contendere plea to reporting a false alarm charge for placing two shot glasses containing cleaning powder in the purse of a co-worker); Katie E. Ismael, *Woman Is Charged Over a Powdery Substance*, PRESS-ENTERPRISE (Riverside, Cal.), Nov. 7, 2001, at B3 (reporting Millspaugh's original charges of attempting a terrorist threat and attempting a threat involving a weapon of mass destruction).

251. See MODEL PENAL CODE §§ 241.4, 250.2-3 (1985) (classifying all three offenses as misdemeanors).

252. See *infra* Part III.C (detailing changes in state hoax legislation, including penalties, following September 11, 2001).

253. See generally Teresa P. Miranda, *Drafting Hoax Anthrax Legislation*, PROSECUTOR, Jan./Feb. 2002, at 14 (summarizing existing state hoax laws and comparing the laws to each other), available at WL 36-Feb Prosecutor 14. The five states are Florida, FLA. STAT. ANN. § 790.166 (West 2002); Georgia, GA. CODE ANN. § 16-7-85. (2002); Kentucky, KY. REV. STAT. ANN. § 508.075 (Banks-Baldwin 2002); Michigan, MICH. COMP. LAWS ANN. § 750.200j (West 2002); and South Carolina, S.C. CODE ANN. § 16-23-730 (Law. Co-op. 2002). These statutes generally prohibit the manufacture, possession, sale, delivery, transport, placement, display, use, threatened use, attempted use, conspiracy to use, release for any unlawful purpose, dissemination, act causing dissemination, concealment, or act making accessible any type of "hoax device" or replica of a deadly device. See Miranda, *supra*, at 14 (noting that the description of the object that is the subject of the hoax varies from state to state, though the elements of the offense are generally very similar).

254. See FLA. STAT. ANN. § 790.166(3) (West 2002) (providing an exception for those persons with lawful authority).

255. COLO. REV. STAT. ANN. § 18-12-109 (West 2002).

256. See *id.* (indicating in the Historical and Statutory Notes that, through an amendment that became effective on June 3, 2002, the terms "chemical, biological, or radiological weapon or materials" were added to the statute, which previously referred only to "explosives or incendiary devices").

257. See Miranda, *supra* note 253, at 14 (demonstrating the wide range of mens rea requirements among the various states).

destruction will cause terror, bodily harm, or property damage.<sup>258</sup> This specific-intent requirement is similar to Florida's terroristic threat statute.<sup>259</sup> At the other end of the spectrum, Michigan has no intent requirement whatsoever; making terroristic threats appears to be a strict liability crime.<sup>260</sup>

The punishments for these crimes also differ drastically. For example, violation of South Carolina's hoax crime statute is a misdemeanor with a maximum penalty of one year and a \$10,000 fine,<sup>261</sup> whereas violation of Florida's statute is a second-degree felony with a maximum penalty of fifteen years and a \$10,000 fine.<sup>262</sup>

In their application, however, these states' hoax crime laws have been used in the same type of prosecutions. Both Florida and Michigan, for instance, have used their respective hoax crime laws against juveniles. James Smith, Jr., a student at Flagler-Palm Coast High School, was charged with violating Florida's hoax crime statute when he poured headache medicine on a teacher's desk to get out of school for the day.<sup>263</sup> A middle-school student in the same area was arrested and almost charged with the same offense,<sup>264</sup> but was eventually released when authorities determined that his justification—he claimed to have accidentally spilled Kool-Aid powder—was legitimate.<sup>265</sup>

Like James Smith, Sean and Christopher Cook wanted to get a day off from school, prompting them to spread a cup of flour from an

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258. See FLA. STAT. ANN. § 790.166 (West 2002) (explaining in the Historical and Statutory Notes that, in 2002, this mens rea requirement was removed entirely from the statute, thereby creating strict liability).

259. See, e.g., *Anthrax Hoax Suspect Posts \$5,000 Bail*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Nov. 17, 2001, at 3B (charging defendant with violation of Florida's hoax crime statute for threatening security guards at a local mall with a film canister containing white powder); Police Report, *Man Pleads Innocent in Mail Hoax*, ST. PETERSBURG TIMES (Fla.), Jan. 24, 2002, at 7 (charging defendant with violating Florida's hoax crime statute for sending two letters containing baby powder to the County Government Center and the sheriff's office).

260. See MICH. COMP. LAWS ANN. § 750.200j (West 2002) (indicating that an individual is in violation of the statute if he or she commits, for any "unlawful purpose," an act involving a hoax substance).

261. See S.C. CODE ANN. § 16-23-730 (Law. Co-op. 2002) (proscribing the manufacture, possession, transportation, distribution, use or aid, or counsel of, solicitation of, or conspiracy with another of the use of a "hoax device").

262. See FLA. STAT. ANN. §§ 790.166, 775.082-.083 (West 2002).

263. See *Lelis*, *supra* note 15, at C3 (reporting that the boy's mother claimed that the hoax was a practical joke).

264. See Sandra Pedicini, *Powder at School Is Only Kool-Aid*, ORLANDO SENTINEL, Oct. 18, 2001, at D1 (labeling the boy's actions as "an apparent attempt to trick people into thinking [Kool-Aid] was anthrax"), available at 2001 WL 28417753.

265. See *Lelis*, *supra* note 15, at C3 (quoting the State Attorney's Office spokeswoman as saying, "[t]here is no evidence to support that a threat or a hoax was intended").



envelope onto a hallway floor.<sup>266</sup> The boys were caught on videotape and pled guilty to violating Michigan's hoax crime statute, which prohibits the "unlawful possession of an imitation harmful substance."<sup>267</sup> They were sentenced to fifty hours of community service at a health care facility and were ordered to watch the arraignment and sentencing of criminal defendants as part of their punishment.<sup>268</sup>

### 3. *Terroristic threats*

One of the most popular means of addressing anthrax hoax crimes is through state terroristic threat statutes. The Model Penal Code defines this offense as a threat "to commit any crime of violence with the purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience."<sup>269</sup>

There are many benefits to using a terroristic threat statute. First, the statute has both a private and public aspect: on the one hand, it protects individuals from personal threats that place the victim in fear of imminent harm;<sup>270</sup> on the other hand, it punishes individuals who disrupt public events or facilities.<sup>271</sup> Second, the form of the terroristic threat does not matter;<sup>272</sup> some states even recognize threats of a non-verbal, symbolic nature.<sup>273</sup> Nor does the offense

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266. See *Anthrax Hoax Brings Sentence*, GRAND RAPIDS PRESS (Mich.), Jan. 10, 2002, at A26 (noting that the boys were suspended for the remainder of the school year), available at 2002 WL 4754705.

267. MICH. COMP. LAWS ANN. § 750.200j (West 2002).

268. See *Anthrax Hoax Brings Sentence*, *supra* note 266, at A26 (stating that this offense normally carries a five-year sentence, but would not be imposed in this case due to the age of the defendants). The court required the boys to pay \$1,668 in restitution. *Id.*

269. MODEL PENAL CODE § 211.3 (1985).

270. See *id.* at Pt. II, art. 211 (1985) (explaining that § 211.3 deals with situations in which the offender threatens to commit a crime of violence with the intent to terrorize another person or group of persons).

271. MODEL PENAL CODE § 211.3 (1985).

272. See, e.g., *People v. Franz*, 106 Cal. Rptr. 2d 773, 786 (Ct. App. 2001) (holding that a threat may be inferred from "all the surrounding circumstances" instead of from "words alone," even where the terroristic threats statute explicitly requires verbal or written statements); *State v. Knight*, 549 P.2d 1397, 1400 (Kan. 1976) ("The general rule is that a threat otherwise coming within the purview of a statute need not . . . be in any particular form or in any particular words, and it may be made by innuendo or suggestion, and need not be made directly to the intended victim."); *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996) (holding that the Minnesota terroristic threats statute places "no restriction" on the term "threatens" that would limit the term to an oral statement).

273. See, e.g., *State v. Miller*, 629 P.2d 748, 751 (Kan. Ct. App. 1981) (determining that the placement of a burning cross in the victim's yard constituted a "threat" within the meaning of the terroristic threats statutes in the circumstances of the

require an overt act in furtherance of the threat<sup>274</sup> or even the possibility that the threat can be carried out.<sup>275</sup> Moreover, the offense is not dependent on the victim's state of mind,<sup>276</sup> but rather on a reasonable person's objective response.<sup>277</sup> Thus, a person could be prosecuted successfully under a terroristic threat statute even where the victim was not placed in actual terror<sup>278</sup> or where the offender was incapable of carrying out the threat.<sup>279</sup> Third, state courts have rejected challenges to terroristic threat statutes based on the First Amendment.<sup>280</sup> These courts reason that, by definition, a terroristic threat constitutes threatening speech and therefore is not protected by the First Amendment.<sup>281</sup> Similarly, challenges on due process grounds have met with near total failure.<sup>282</sup>

Due to the statutes' apparent imperviousness to constitutional challenges, several states have used their terroristic threat or

case); *Murphy*, 545 N.W.2d at 915-16 (affirming conviction of defendant under a terroristic threat statute where defendant placed dead animal parts on the victim's property because to restrict the term "threat" to verbal or written statements would result in an "absurd[ity]").

274. See, e.g., *Carver v. State*, 369 S.E.2d 471, 472 (Ga. 1988) (holding that the crime of terroristic threats is consummated when the threat is communicated to the victim with the intent to terrorize).

275. See, e.g., *Allen v. State*, 453 A.2d 1166, 1168 (Del. 1982) (reasoning that an offender need not intend to carry out a threat to violate the Delaware terroristic threatening statute because the "threat itself creates certain identifiable injuries . . . that the Criminal Code should protect against"); *State v. Rodriguez*, 569 N.W.2d 686, 695 (Neb. Ct. App. 1997) (holding that the defendant need not intend to execute his threats to satisfy the requirements of the Nebraska terroristic threats statute).

276. See, e.g., *Rodriguez*, 569 N.W.2d at 695 (recognizing that the victim of a terroristic threat need not be terrorized).

277. See, e.g., *State v. Milner*, 571 N.W.2d 7, 10 (Iowa 1997) (recognizing that the "reasonable person of ordinary intelligence" standard must be applied in light of the circumstances of the case).

278. See, e.g., *Rodriguez*, 569 N.W.2d at 695 (demonstrating that a victim does not need to be terrorized in order to find the defendant guilty of terroristic threatening).

279. See, e.g., *Allen*, 453 A.2d at 1168 (holding that a defendant can commit terroristic threatening without an intent to carry out the threat).

280. See, e.g., *People v. Toledo*, 26 P.3d 1051, 1060 (Cal. 2001) ("[I]t is clear that defendant's conviction of attempted criminal threat was not based upon constitutionally protected speech."); *Lanthrip v. State*, 218 S.E.2d 771, 773 (Ga. 1975) (reasoning that the type of speech involved in terroristic threats is not the type of speech that would otherwise receive First Amendment protection); *Commonwealth v. Green*, 429 A.2d 1180, 1182-83 (Pa. Super. Ct. 1981) (stating that the state's interest in the welfare of its citizens was sufficient to prohibit terroristic threats).

281. *Toledo*, 26 P.3d at 1060; *Lanthrip*, 218 S.E.2d at 773; *Green*, 429 A.2d at 1182-83.

282. See, e.g., *Lanthrip*, 218 S.E.2d at 773 (denying that the Georgia terroristic threats statute is unconstitutionally vague because "the standard of guilt contained in the statute is not left to speculation or conjecture, but rather, is fixed and certain as to the conduct prohibited therein"); *Milner*, 571 N.W.2d at 14 (dismissing defendant's First Amendment claims on the ground that the defendant's statements were not protected by the First Amendment).

terrorizing statutes to prosecute anthrax hoaxsters. For one example, a man who had told workers in the downtown office of the Pennsylvania Department of Public Welfare that he had a box containing anthrax was charged with making a terroristic threat,<sup>283</sup> even though he claimed to suffer from a mental illness.<sup>284</sup> In another instance, Andrew James Theodorakis, a senior at Dickinson College, faced charges of both terroristic threatening and causing a catastrophe for placing white powder in two envelopes sent through intercampus mail bearing the message, "You now have anthrax. Prepare to die."<sup>285</sup>

Louisiana prosecutors have been especially zealous in their application of the state's terrorizing statute to hoax crimes,<sup>286</sup> using the law to prosecute a sixty-four-year-old preacher and two middle-school student pranksters,<sup>287</sup> among others. The preacher, Reverend Charles Alexander, hand-delivered a letter containing salt to a social service agency, forcing an evacuation of the building.<sup>288</sup> He claimed that the salt held religious significance for him and was meant as an appeal to God.<sup>289</sup> His arrest led to protests and demonstrations on his behalf outside the Lafayette courtroom.<sup>290</sup> Eventually, Reverend Alexander was released on bail on the condition that he refrain from placing salt in any more envelopes.<sup>291</sup>

283. See *Man Faces Trial for Threats*, PITTSBURGH POST-GAZETTE, Dec. 28, 2001, at B2 (reporting that the box actually contained Christmas tree branches).

284. See *id.* (stating that the defendant intended to use mental illness as a defense to the crimes charged).

285. See Elizabeth Gibson, *Collegian Posts Bail in Anthrax Hoax*, PATRIOT-NEWS (Harrisburg, Pa.), Nov. 6, 2001, at A3 (reporting that Theodorakis was also suspended indefinitely from college for perpetrating the hoax).

286. See, e.g., Stephanie Doster, *Avondale Worker Held in Shipyard Anthrax Hoax*, TIMES-PICAYUNE (New Orleans, La.), Oct. 19, 2001, at 1 (describing the arrest of Victor Falgout of Avondale on a charge of "terrorizing" after Falgout allegedly sprinkled sugar in an Avondale shipyard's mailroom).

287. See Melissa Moore & Kevin Blanchard, *2 Glen Oaks Students Face Charges in Powder Hoax*, ADVOCATE (Baton Rouge, La.), Oct. 18, 2001, at 4A (reporting the arrest of both students on terrorizing charges).

288. *Jeanerette Pastor to Face Trial in Anthrax Hoax to State Agency*, ADVOCATE (Baton Rouge, La.), Dec. 9, 2001, at 4B [hereinafter *Jeanerette Pastor*] (quoting Assistant District Attorney Greg Williams as saying that Alexander "wreaked havoc" with his actions).

289. See Moore & Blanchard, *supra* note 287, at 4A (stating that the letter asked the agency to investigate allegations that Reverend Alexander's grandchild was being abused). But see Mandy Maxwell, *Anthrax Scare Taxes Police, Health Officials*, ALEXANDRIA DAILY TOWN TALK (La.), Oct. 18, 2001, at 2 (claiming that Alexander was upset with the social services department and had threatened the department in the past), available at 2001 WL 33145698.

290. See *Jeanerette Pastor*, *supra* note 288, at 4B (reporting that protesters bearing signs and using megaphones gathered outside the courtroom in support of Alexander).

291. See *id.* (stating that his bail was originally set at \$150,000 but was reduced to \$50,000 on the condition that Alexander's attorney speak to him about "being

As for the two middle-school students, they were taken to juvenile hall after placing an envelope containing baby powder on a teacher's desk.<sup>292</sup> Both the teacher and the school principal immediately recognized the hoax as a prank but reported the incident to the School Drug Task Force the following morning.<sup>293</sup> That report resulted in the arrest of the two thirteen-year-old boys.<sup>294</sup> Finally, three teens from Cobb County, Georgia were charged with making terroristic threats for placing envelopes filled with flour on neighbors' mailboxes on Halloween.<sup>295</sup>

In addition to terroristic threatening laws, several states have prosecuted anthrax hoaxsters<sup>296</sup> under legislation prohibiting the use or threatened use of weapons of mass destruction.<sup>297</sup> The California statute, for example, provides:

Any person who knowingly threatens to use a weapon of mass destruction, with the specific intent that the statement . . . be taken as a threat, which on its face is so unequivocal, immediate and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat . . . shall be punished.<sup>298</sup>

In Riverside, California, Randy Williams and Michael Vasquez, both fourteen years old, faced harsh penalties for violating this statute.<sup>299</sup> The boys decided to stage a Halloween prank by placing sugar in four white envelopes marked "God Bless Afghanistan" and then placing

socially responsible").

292. See Moore & Blanchard, *supra* note 287, at 4A (relating that the students placed the envelope on the teacher's desk while she was tutoring after school).

293. See *id.* (stating that the teacher recognized that the substance smelled like baby powder).

294. See *id.* (stating that the two boys confessed to committing the hoax and confirmed that the substance was baby powder).

295. See *Cobb Teens Held in Mailbox Threats*, ATLANTA J. & CONST., Nov. 10, 2001, at H7 (stating that the sixteen-year-old and the two seventeen-year-olds were being held on \$25,000 bond each).

296. See, e.g., Gorman, *supra* note 249, at B3 (listing those defendants charged under California's state equivalent of 18 U.S.C. § 2332a for perpetrating anthrax hoaxes).

297. See, e.g., CAL. PENAL CODE § 11418.5(a) (West 2002) (criminalizing the threatened use of a weapon of mass destruction); 18 PA. CONS. STAT. ANN. § 2715(a)(4) (2002) (indicating that a violation is committed if an individual "intentionally threatens by any means the placement or setting of a weapon of mass destruction"); W. VA. CODE § 61-6-24 (2002) (prohibiting threats of terrorist acts).

298. See CAL. PENAL CODE § 11418.5(a) (West 2002) (providing a punishment of imprisonment in the county prison for a maximum of one year or in state prison for three, four, or six years, and a maximum fine of \$250,000).

299. See Rocky Salmon, *14-year-olds Face Charges in Prank*, PRESS-ENTERPRISE (Riverside, Cal.), Feb. 4, 2002, at B1 (reporting that Creg Datig, overseer of the district attorney's juvenile division, who attempted to explain the tough approach to the boys' actions, stated that, "for the victim and in the eyes of law enforcement, there is no difference between a prank and the real thing").

the envelopes in friends' mailboxes.<sup>300</sup> Unfortunately for the boys, one envelope inadvertently ended up in the wrong mailbox, resulting in a six-hour investigation of the envelope to determine its contents.<sup>301</sup> Although the boys immediately stepped forward and their parents offered to pay for all costs associated with the decontamination effort, prosecutors arrested Williams and Vasquez out of fear for public safety.<sup>302</sup> If convicted, the boys could have faced an indeterminate amount of time in juvenile hall for the offense and might also have been declared wards of the state, which would have resulted in a separation of the boys from their parents.<sup>303</sup>

### C. State Hoax Crime Legislation Following September 11, 2001

The wave of real and hoax anthrax crimes that terrorized the nation in the aftermath of September 11 prompted many states to create or tighten laws punishing hoaxes involving a fake weapon of mass destruction.<sup>304</sup> There is no clear and consistent reasoning behind the approaches taken by these states, however. Some states have simply amended their old laws to cope with new criminal realities in the wake of September 11, some have created new laws out of old cloth, and some states have employed both of these approaches.<sup>305</sup>

States without hoax statutes after September 11 are in a very precarious situation. These states are likely to punish perpetrators under disorderly conduct or false alarm laws.<sup>306</sup> Such a plan presents

300. See *id.* (stating that the boys went out on Halloween wearing signs around their necks with "Anthrax" scrawled on them).

301. See *id.* (reporting that the neighbor receiving the anthrax was terrified while she was waiting to learn whether the substance was real anthrax, but that she now forgives the boys because they know what they did was wrong).

302. See *id.* (quoting the prosecuting attorney as saying: "What kind of message would it send if we didn't take these cases seriously[?] . . . We would be evacuating places on a daily basis."). Prosecutors, however, decided against pursuing the matter further. See Rocky Salmon, *No Felony Charges in Anthrax Hoax*, PRESS-ENTERPRISE (Riverside, Cal.), Feb. 5, 2002, at B1.

303. See *id.* (claiming that the boys' parents have already paid a fine of \$2,500 each for emergency response costs, and that the boys have apologized to all of their neighbors and the firefighters who responded to the hoax).

304. In addition to the variety of statutes that states have enacted individually, the Emergency Health Powers Act, which is a model bioterrorism response law, has been introduced in thirty-six states and adopted in part by eighteen states and the District of Columbia. See Marcia Coyle, *Bioterror law gains ground: Model statute wins favor in 19 states*, NAT'L L.J., Sept. 23, 2002, at A1 (stating that the purpose of the Emergency Health Powers Act is to strengthen state officials' emergency powers and modernize public health laws).

305. See *infra* Part III.C (examining the combinations of new and amended hoax crime statutes developed post-September 11, 2001).

306. See, e.g., Daniel C. Vock, *Pols Work to Restore Laws Struck Down by High Court*, CHI. DAILY L. BULL., Nov. 27, 2001, at 1 (reporting that a prosecutor was charged with disorderly conduct after committing an anthrax hoax against the Cook County State's Attorney Office in October 2001); Beauge, *supra* note 34, at B12 (stating that

a variety of problems. First, states might not be able to punish these perpetrators appropriately in comparison to states that have statutes designed specifically to combat anthrax hoax crimes. Second, disorderly conduct or false alarm laws are often found to be vague and overly broad, which could give police too much power in arresting alleged hoaxsters and allow for over-punishment of hoaxsters.<sup>307</sup> Massachusetts faced this problem when an anthrax hoax was perpetrated at the Agawam armory.<sup>308</sup> Agawam Police Chief Robert Campbell explained that "our laws haven't had to deal with things like anthrax hoaxes. . . . We had fire trucks and hazmat teams at the armory, and white powder spread over the equipment, and no way to charge anybody and no deterrent."<sup>309</sup> Prosecutorial problems similar to the Agawam armory incident will continue as long as states lack the ability to charge hoaxsters under narrowly tailored state law instead of under federal law.<sup>310</sup>

Several states have enacted sweeping and comprehensive legislation in an effort to combat anthrax hoax crimes. The remainder of this section of the Article chronicles some of the states' attempts to reconcile the disparities in prosecuting hoax crimes.

California's amended hoax crime statutes now accommodate the circumstances surrounding recent anthrax hoaxes.<sup>311</sup> The state's amended weapons of mass destruction statute includes a hoax provision,<sup>312</sup> as well as an expanded definition of weapons of mass destruction.<sup>313</sup> The statute also augmented the circumstances in which the threatened use of a weapon of mass destruction is considered a crime.<sup>314</sup>

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Steven Welch, a firefighter, was charged with making a false alarm to a public safety agency for falsely telling federal officials that there was white powder in the envelope containing his income tax refund).

307. See *City of Chicago v. Morales*, 527 U.S. 41 (1999) (striking down a loitering statute as being void-for-vagueness).

308. Steve Marantz, *Anti-Terrorism Bill Stuck at State House*, BOSTON HERALD, Sept. 1, 2002, at 1 (reporting that "[a]n anthrax hoax at the Agawam armory . . . was prosecuted under a federal statute because the state law was inadequate").

309. *Id.* (stating that the hoax was prosecuted under a federal statute because the state law did not fit the crime).

310. Since the Agawam incident, the Massachusetts Legislature passed an amendment to the state criminal code, adding hoax substances to the hoax device statute. See MASS. GEN. LAWS ANN. ch. 266, § 102A 1/2 (West 2004).

311. See CAL. PENAL CODE § 11418.1 (West 2004) (creating a new component of § 11418 entitled "False or facsimile of weapon of mass destruction"). This section adds a provision that changed the mens rea requirement. *Id.*

312. *Id.*

313. See *id.* § 11417 (expanding the meaning of weapon of mass destruction to include chemical, biological, nuclear, and radiological agents).

314. See *id.* § 11418.5 (allowing the occurrence of isolation, quarantine, or decontamination to serve as proof that the victim was in "sustained fear" for his own

California Penal Code § 11418.1 provides a penalty for any individual who uses a hoax weapon of mass destruction with the “intent to cause another person to fear for his or her safety, or for the personal safety of others.”<sup>315</sup> Violators of the hoax weapon of mass destruction provision incur a maximum penalty of one year imprisonment in county prison or “in the state prison for 16 months, or two or three years and . . . a fine of not more than two hundred and fifty thousand dollars (\$250,000).”<sup>316</sup>

California’s “Threats to use weapon of mass destruction”<sup>317</sup> law still maintains an extremely specific standard of intent; the amendment requires that the offender intend to make a threatening statement “so unequivocal, immediate, and specific” as to lead the victim to believe that execution of the threat is imminent.<sup>318</sup> The amendment also requires the offender to make the threat knowingly and with the specific intent to cause another to fear for his or her own or immediate family’s safety.<sup>319</sup> Offenders who violate this section face a state prison sentence of three, four, or six years and a fine of not more than \$250,000.<sup>320</sup>

In contrast, the amendment to Florida Statutes Annotated § 790.166 eliminated the intent requirement from its hoax crime.<sup>321</sup> The statute now incorporates biological agents as weapons of mass destruction<sup>322</sup> and prohibits the acts of mailing and sending hoax weapons of mass destruction.<sup>323</sup> However, the state’s false reporting statutes<sup>324</sup> continue to require the intent to deceive, mislead, or

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or his family’s safety, which is a requirement for prosecution of a hoaxster on a weapons of mass destruction charge).

315. See *id.* § 11418.1 (requiring that the offender “gives, mails, sends, or causes to be sent” to another individual or “places, causes to be placed, or possesses” a hoax weapon of mass destruction).

316. *Id.*

317. *Id.* § 11418.5.

318. *Id.*

319. *Id.*

320. *Id.*

321. See S.B. 998, 2002 Leg., 104th Reg. Sess. § 4(3) (Fla. 2002) (enacted) (eliminating the requirement that the offender intend “to deceive or otherwise mislead another person into believing the hoax weapon of mass destruction will cause terror, bodily harm, or property damage”).

322. See FLA. STAT. ANN. § 790.166(1)(c) (West 2004) (including “biological agent” instead of “disease organism”).

323. See *id.* § 790.166(3) (indicating that an individual is also in violation of the provision if he or she “manufactures, possesses, sells, delivers, mails, sends, displays, uses, threatens to use, attempts to use, or conspires to use, or who makes readily accessible to others a hoax weapon of mass destruction”).

324. *Id.* §§ 790.163-164.

otherwise misinform the public about the placement of a weapon of mass destruction.<sup>325</sup>

Pennsylvania's terroristic threat statute<sup>326</sup> now includes a restitution provision<sup>327</sup> and an expanded set of circumstances under which the offense, normally a misdemeanor, is classified as a felony of the third degree.<sup>328</sup> The state law that prohibits reports or threats of bombs has been amended to include any such activity involving any weapon of mass destruction.<sup>329</sup> Pennsylvania also codified a new facsimile weapons of mass destruction statute that incorporates its former facsimile bomb statute.<sup>330</sup> Under this revised law, the intentional, knowing, or reckless manufacture, sale, purchase, transport, delivery, possession, or use of such a device is a third-degree felony if the device harasses an individual or creates alarm or reaction on the part of a government agency.<sup>331</sup> In addition to providing for imprisonment, the statute also mandates that the perpetrator pay restitution to the government.<sup>332</sup>

Unlike either the California or Florida statutes, Pennsylvania makes the creation or use of a hoax device a greater offense than a mere threat of harm.<sup>333</sup> However, Pennsylvania's "Terroristic threats"<sup>334</sup> and "Threat to use weapons of mass destruction"<sup>335</sup> statutes are constructed to provide equivalent penalties for threats regarding weapons of mass destruction where those threats have the same effects as the actual placement or use of a hoax device.<sup>336</sup> Because the

325. See *id.* § 790.163(3); § 790.164(3) (qualifying that a false report that is knowingly made should be considered *prima facie* evidence of intent to deceive).

326. 18 PA. CONS. STAT. ANN. § 2706 (West 2004).

327. See *id.* § 2706(b) (requiring any person convicted to pay restitution to the government).

328. See *id.* § 2706(d) (including an upgraded penalty where "the threat causes the occupants of the building, place of assembly or facility of public transportation to be diverted from their normal or customary operations").

329. See *id.* § 2715(a)(3) (containing an amendment to the state's weapons of mass destruction statute); see also H.B. 339, 45th Leg., 2d Reg. Sess. (N.M. 2002) (adding the generic term "weapons of mass destruction" to a list of items whose unlawful use may not be taught to others; this bill passed in the House Committee on Judiciary, but died in the Senate Committee on Judiciary).

330. See 18 PA. CONS. STAT. ANN. § 5516 (West 2004) (incorporating facsimile bombs into the weapons of mass destruction statute).

331. *Id.* § 5516(a).

332. *Id.* § 5516(b)(b.1) (providing automatic restitution for all costs caused by the offender's actions).

333. Compare *id.* § 2706(d), and *id.* § 2715(a) (denominating these offenses as misdemeanors in most circumstances), with *id.* § 5516(a)-(b) (listing the offense a felony).

334. *Id.* § 5516.

335. *Id.* § 2715.

336. See *id.* §§ 2706(d), 2715(b)(2) (making the offenses third-degree felonies where the report or threat causes the occupants of a building, place of assembly, or facility of public transportation to be diverted from their normal or customary



amended statutes are primarily based on pre-existing state law, Pennsylvania continues to differentiate between hoaxes that are private in nature and those that impede basic public functions. This separation attempts to resolve the conflict between public demands to punish anthrax hoaxsters and the need to adhere to principles of proportional punishment.

Two other states have moderately amended their extant laws. Alaska redefined its terroristic threatening statute to include false reports that disrupt the schedule of any entity providing transportation services or the entity's attendant support services or staff.<sup>337</sup> Ohio laws §§ 2917.31<sup>338</sup> and 2917.32<sup>339</sup> impose additional punishment on any person who induces panic resulting in physical injury<sup>340</sup> or makes a false alarm involving weapons of mass destruction.<sup>341</sup>

Rather than amending its laws, Virginia responded to September 11 by enacting a new statute that prohibits the "[p]ossession, manufacture, distribution, etc. of weapons of terrorism or hoax device[s]."<sup>342</sup> This statute has already been employed by prosecutors.<sup>343</sup> The law provides separate punishments for actual and hoax uses of weapons of terrorism.<sup>344</sup> Like Virginia, North Carolina added a hoax crime section to its body of criminal law.<sup>345</sup> This section criminalizes the intentional perpetration of a hoax involving false weapons of mass destruction.<sup>346</sup> North Carolina's criminal law also includes a prohibition against false reports concerning weapons of

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operations).

337. See ALASKA STAT. § 11.56.810 (Michie 2002) (providing that knowingly making a false report is considered terrorist threatening in the second degree and is a class C felony).

338. OHIO REV. CODE ANN. § 2917.31 (West 2003).

339. *Id.* § 2917.32.

340. See *id.* § 2917.31 (increasing punishment from a first-degree misdemeanor to a fourth-degree felony).

341. See *id.* § 2917.32 (providing heightened punishment for offenses involving threatened weapons of mass destruction or resulting in severe economic harm).

342. VA. CODE ANN. §§ 18.2-46.6 (Michie 2004).

343. See *Store Manager Accused in Sniper Hoax*, N.Y. TIMES, Oct. 14, 2002, at A15 (explaining that Virginia's new hoax law was used to charge a Burger King employee who falsely reported—in the midst of the sniper attacks in the Washington, D.C. area—the existence of a sniper on the roof of the restaurant in order to get the day off from work).

344. See VA. CODE ANN. §§ 18.2-46.6(A), (B) (Michie 2004) (classifying the use of an actual weapon of terrorism as a class 2 felony, whereas the hoax use of such a weapon is a class 3 felony).

345. N.C. GEN. STAT. ANN. § 14-288.24 (2003).

346. See *id.* § 14-288.24(a) ("Any person who, with intent to perpetrate a hoax, conceals, places, or displays any device, object, machine, instrument, or artifact, so as to cause any person reasonably to believe the same to be a nuclear, biological, or chemical weapon of mass destruction is guilty of a Class D felony.").

mass destruction.<sup>347</sup> A false report occurs when a person knows or should know that a report is false and communicates the report, thereby causing a person reasonably to believe that there is a weapon of mass destruction in a building or structure.<sup>348</sup>

Indiana's legislature, like Virginia's, created a new criminal law section in its weapons of mass destruction chapter. This section added the new offense of "Terroristic mischief."<sup>349</sup> This Class C felony<sup>350</sup> requires the intentional or knowing placement or dissemination of a device or substance "with the intent to cause a reasonable person to believe that the device or substance is a weapon of mass destruction."<sup>351</sup> In other words, this law would constitute a typical hoax crime statute. However, if an act of terroristic mischief results in a physician prescribing diagnostic testing or medical treatment "for any person other than the person who committed"<sup>352</sup> the offense, or if a person suffers serious bodily injury,<sup>353</sup> the proposed crime becomes a Class B felony, which is a more serious offense.<sup>354</sup>

Similarly, Illinois added a terroristic threat statute,<sup>355</sup> which requires a knowing threat to commit a terrorist act that causes a reasonable expectation of the imminent commission of the act.<sup>356</sup> The threat must also be made with the intent to intimidate or coerce "a significant portion of the civilian population."<sup>357</sup> A violation would constitute a Class X felony,<sup>358</sup> punishable by up to thirty years in prison.<sup>359</sup> One unique feature of Illinois' legislation is its false terroristic threat statute,<sup>360</sup> which criminalizes a threat to commit a terrorist act, create a catastrophe, or create the impression that such

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347. *Id.* § 14-288.23.

348. *Id.* § 14-288.23(a).

349. IND. CODE ANN. § 35-47-12-3 (Michie 2004).

350. *Id.*

351. *Id.*

352. *Id.* § 35-47-12-3(1).

353. *Id.* § 35-47-12-3(2).

354. *Id.* § 35-47-12-3.

355. 720 ILL. COMP. STAT. ANN. 5/29D-20 (West 2003).

356. *Id.* 5/29D-20(a).

357. *Id.*

358. *Id.* 5/29D-20(c).

359. 730 ILL. COMP. STAT. ANN. 5/5-8-1(3) (West 2003).

360. See 720 ILL. COMP. STAT. ANN. 5/29D-25 (supplementing the state's proposed "terroristic threats" statute); see also ALASKA STAT. § 11.56.810 (Michie 2002) (containing a similar provision concerning false reports of terroristic threats).

an act is about to be or has been committed.<sup>361</sup> This Class 1 felony<sup>362</sup> requires only that the offender knew that the threat was false.<sup>363</sup>

While the terroristic threat and false terroristic threat statutes might sound redundant, combined they are more effective than a terroristic threat statute alone, because together they can combat the evolving nature of hoax crimes. For example, unlike Florida's hoax crime legislation,<sup>364</sup> Illinois' legislation differentiates malicious hoax crimes from those made in jest and provides penalties reflecting this difference.<sup>365</sup> Because the provisions are rooted in the language of threats, Illinois' legislation avoids possible vagueness concerns while maintaining effective mechanisms for punishing pranksters who perpetrate hoaxes involving weapons of mass destruction.

The use of the term "threat" carries its own perils, however. It is unclear exactly how either of the Illinois statutes applies to a situation in which a hoaxster claims to be the victim of a weapon of mass destruction. For example, an office worker who pours sugar on his desk and calls it anthrax,<sup>366</sup> or a firefighter who calls the police and claims he has been exposed to anthrax,<sup>367</sup> does not clearly seem to have threatened to commit or cause the commission of a terrorist act. While he or she may be the perpetrator of the hoax, the prankster in this situation does not claim to perpetrate an actual act of terrorism. Ultimately, the dependency of Illinois' legislation on actual or false threats to commit terrorist acts could render either legislation ineffective where a grossly inappropriate, yet non-threatening, hoax is perpetrated.

A better alternative to Illinois' actual and false terroristic threat provisions is South Dakota's new and amended legislation,

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361. 720 ILL. COMP. STAT. 5/29D-25 (West 2003). "Terrorist act" is defined at 5/29D-10(1)(l). *Id.* "Catastrophy" is defined at 20.5-5. *Id.*

362. *Id.* 5/29D-25(b).

363. *Id.* 5/29D-25(a).

364. See FLA. STAT. ANN. § 790.166(3) (West 2002) (eliminating any requirement of intent by the perpetrator of a hoax crime).

365. Compare 720 ILL. COMP. STAT. 5/29D-20(c) (West 2003) (making an actual terroristic threat a Class X felony with a punishment of up to thirty years), with *id.* 5/29D-25(b) (making a false terrorist threat a Class 1 felony with a punishment of up to fifteen years).

366. See, e.g., Tucker *supra* note 33, at B4 (describing the arrest and trial of a U.S. Capitol Police officer who sprinkled granules of artificial sweetener on a guard station desk).

367. See, e.g., Beauge, *supra* note 34, at B12 (covering the story of Steven Welch, a Pennsylvania firefighter who falsely claimed to be the victim of an anthrax attack). Welch told federal officials that there was white powder in the envelope containing his income tax refund when in fact there was no such powder. *Id.* He was charged with criminal mischief, making a false alarm to a public safety agency, making false reports to law enforcement agencies, and tampering with evidence. *Id.*

encompassing false reporting,<sup>368</sup> terroristic threats,<sup>369</sup> and hoax crimes.<sup>370</sup> South Dakota promulgated proscribing a terroristic threat, which is punished as a Class 4 felony, making it the most serious of these three offenses.<sup>371</sup> The criminal hoax statute punishes any person who intentionally places, possesses, uses, or transports a hoax substance or device with the intent of causing anxiety, unrest, fear, or personal discomfort.<sup>372</sup> Such a statute preserves the stricter intent requirements of the Illinois criminal code provisions, while broadening the potential application of the law to any hoax situation. By focusing on the motive for the hoax rather than on the form, South Dakota's law provides an effective alternative to the under-inclusive Illinois provision.

While South Dakota's false reporting law requires the intent to deceive, mislead, or misinform another, North Carolina has no intent requirement for false reporting.<sup>373</sup> In contrast, both states require intent for a violation of their hoax crime statutes.<sup>374</sup> Although North Carolina requires intent for a hoax and not for a false report, conviction for either offense results in the same level of punishment.<sup>375</sup> This anomaly allows for the possibility that an intentional crime may be punished identically to a strict liability crime. South Dakota avoids this inconsistency by requiring intent for both offenses and differentiating between punishments.<sup>376</sup>

368. S.D. CODIFIED LAWS § 22-14A-22 (Michie 2003) (including a 2002 amendment that added "dangerous chemical, biological agent, [and] poison" to the list of destructive devices covered by statute and substituting "reporting a threat" for "reporting a bomb").

369. *Id.* § 22-14A-24 ("Use of substance or device to communicate terroristic threat").

370. *Id.* § 22-14A-25 ("Use of hoax substance or device to cause fear").

371. *Id.* § 22-14A-24 (criminalizing a threat that causes "serious public inconvenience, or the evacuation or serious disruption" in a variety of listed public places).

372. *See id.* § 22-14A-25 (defining a hoax substance as "any substance that would cause a person to reasonably believe that it is a dangerous chemical or biological agent, a poison, a harmful radioactive substance, or a similar substance").

373. *Compare id.* § 22-14A-22 (punishing those who possess intent to mislead any person), with N.C. GEN. STAT. § 14-288.23 (2003) (requiring mere knowledge on the part of the person making the report).

374. *See* N.C. GEN. STAT. § 14-288.24 (2003) (requiring the "intent to perpetrate a hoax"); S.D. CODIFIED LAWS § 22-14A-25 (Michie 2003) (requiring the "intent of causing anxiety, unrest, fear, or personal discomfort").

375. *See* N.C. GEN. STAT. § 14-288.24 (2003) (classifying a hoax offense as a Class D felony); *see also id.* § 14-288.23 (classifying a false report as a Class D felony).

376. *Compare* S.D. CODIFIED LAWS § 22-14A-25 (Michie 2003) (classifying a hoax offense as a Class 5 felony), with *id.* § 22-14A-22 (classifying a false report as a Class 6 felony).

Analogous to South Dakota, New Jersey's terroristic threat statute<sup>377</sup> states that threatening "to commit any crime of violence with the purpose to terrorize another or cause the evacuation"<sup>378</sup> of a public facility or otherwise inconvenience the public in reckless disregard of the risk of causing such terror is a third-degree felony.<sup>379</sup> New Jersey also amended its false public alarms statute by increasing the penalties for violating the law<sup>380</sup> and created additional penalties for false public alarms involving the use of a facsimile bomb.<sup>381</sup>

While most states have been successful in passing meaningful hoax crime legislation, some states have not been able enact such laws. States' failed legislation, however, can provide practical suggestions to prosecute a variety of terrorist hoaxes. Kansas Senate Bill 594<sup>382</sup> and Kansas House Bill 2986<sup>383</sup> proposed a comprehensive, straightforward response to recent anthrax hoaxes. The bills included sections on false reporting,<sup>384</sup> perpetrating a hoax with a weapon of mass destruction,<sup>385</sup> and terroristic threats.<sup>386</sup>

The Kansas false reporting provision would criminalize any false report that causes another person to reasonably believe that a weapon of mass destruction is located in a nearby building, provided the offender knows or should have known that the report is false.<sup>387</sup> The proposed hoax weapon statute would criminalize the intentional concealment, placement, or display of "any device, object, machine, instrument or artifact" that causes a reasonable person to believe the device is a weapon of mass destruction.<sup>388</sup> The false reporting and

377. N.J. STAT. ANN. § 2C:12-3 (West 2003).

378. *Id.*

379. *See id.* (violating this statute during a declared national, state, or county emergency is a second-degree felony).

380. *See id.* § 2C:33-3(c) (upgrading the offense to a first-degree felony if the alarm results in death or serious bodily injury to another).

381. *See id.* § 2C:33-3(b) (providing that it would also be a "crime of the second degree if in addition to the report or warning initiated, circulated or transmitted" the offender placed or caused to be placed any "false or facsimile bomb in a building, place of assembly, or facility of public transport or in a place likely to cause public inconvenience or alarm"). The statute does not address penalties for the use of facsimile biological weapons.

382. S.B. 594, 79th Leg., 2002 Reg. Sess. (Kan. 2002).

383. H.B. 2986, 79th Leg., 2002 Reg. Sess. (Kan. 2002).

384. *See* Kan. S.B. 594, § 7 (proposing a new offense labeled "false report involving a weapon of mass destruction").

385. *See* Kan. H.B. 2986, § 6(a) (proposing a new offense labeled "perpetration of a hoax by a weapon of mass destruction").

386. *See* Kan. S.B. 594, § 2 (defining terroristic threat as any "threat to commit the crime of terrorism causing reasonable expectation or fear of imminent commission of such offense").

387. *See id.* § 7(a) (defining a false report as communication "by any means" that is knowingly false).

388. Kan. H.B. 2986, § 6(a) (requiring that the weapon of mass destruction be

hoax weapons bills avoid overbreadth by including a mens rea requirement.<sup>389</sup> The terroristic threats provision would punish any threat to commit terrorism that causes a "reasonable expectation or fear of imminent commission of that offense."<sup>390</sup> Further, a violation of the hoax crime provision would constitute a level 3 felony offense,<sup>391</sup> while false reports and terroristic threats would constitute level 4 offenses.<sup>392</sup>

Like Kansas, Alabama was also unable to pass new hoax crime legislation.<sup>393</sup> Alabama proposed a comprehensive legislative plan for addressing hoax crimes.<sup>394</sup> This legislation differentiated between a hoax crime intended *to harm* the victims<sup>395</sup> and one intended *to fool* the victims.<sup>396</sup> This difference in intent was reflected in the classification of the offenses: the more egregious the intent, the harsher the sentence. However, the false reporting provision,<sup>397</sup> which had no scienter requirement<sup>398</sup> but provided for the same punishment as a hoax crime,<sup>399</sup> nullifies the utility of a hoax crime provision. That is, the amended false reporting statute, which has no intent requirement, provides the same penalty as the proposed hoax crime legislation, which does have an intent requirement. It is unclear why a prosecutor would ever use the law contemplated in the proposed hoax crime legislation when he or she could reach the same result under the false reporting statute, whose elements are easier to meet.

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nuclear, radiological, biological, or chemical in nature).

389. For an example of overly broad state legislation due to a lack of a mens rea requirement, see FLA. STAT. ANN. § 790.166 (2),(3) (West 2002).

390. Kan. S.B. 594, § 2(a).

391. Kan. H.B. 2986, § 6(c).

392. Kan. S.B. 594, § 7(c) (classifying a false report as "level 4, nonperson felony"). If death or injury occurs due to the threat, it shall be punished as a Level 2 offense. *Id.* § 2(b)(2).

393. See Status of S.B. 265, 2002 Reg. Sess. (Ala. 2002), available at <http://alisd.b.lis.state.al.us/acas/SESSBillsStatusResults.asp?BillNumber=265> (noting that the Alabama Senate Bill was "Indefinitely Postponed in House of Origin").

394. S.B. 265, 2002 Reg. Sess. (Ala. 2002) (repealing state laws governing possession and use of explosive devices and false explosive devices).

395. See *id.* § 7(c) (specifying that a hoaxster who interferes with "the ability of another person to carry on the ordinary course of business, trade, education, or government" will be guilty of a Class C felony).

396. See *id.* § 7(a)-(b) (criminalizing the manufacture, possession, transport, or distribution of "a hoax device or replica of a destructive device, detonator or bacteriological or biological weapon" as a Class A misdemeanor).

397. *Id.* § 22(b) (expanding the false reporting provision to include "hazardous or dangerous substance[s]").

398. See *id.* § 22(a) (requiring only that the offender know that the report is false).

399. Compare Ala. S.B. 265 § 22(b), with *id.* § 7(d) (classifying both of these offenses as Class C felonies).

### III. PROBLEMS WITH CURRENT ANTHRAX HOAX LAWS AND PROPOSED LEGISLATION

#### A. *Definitional and Textual Problems*

One of the most fundamental problems with current anthrax hoax laws is that many states' definitions of biological weapons of mass destruction do not include hoax biological agents. New Jersey's biological agents statute illustrates this basic substantive predicament.<sup>400</sup> Although New Jersey's new statute makes it illegal to threaten to use a biological agent, including anthrax, the only part of the statute relevant to hoaxes is a provision that proscribes the placement of a false or facsimile bomb<sup>401</sup> in combination with causing a false public alarm.<sup>402</sup>

Another fatal flaw in states' hoax crime laws is that, while they could easily incorporate hoax biological agents, they appear to refer only to detonators or destructive devices. This flaw can be rectified if state legislation amends or creates new statutes to include hoax substances. Massachusetts' original hoax devices statute, for example, included "any device for endangering life or doing unusual damage to property, or both, by fire or explosion, whether or not contrived to ignite or explode automatically."<sup>403</sup> Although fake anthrax mimics a biological agent that threatens human life, this statute would not readily apply to anthrax hoax crimes because anthrax does not cause damage by fire or explosion. To correct this deficiency, Massachusetts amended its hoax device statute to include hoax substances.<sup>404</sup>

Further, textual problems plague state hoax crime laws that use the term "threat." The dictionary definition of "threat"<sup>405</sup> leaves unclear whether making a threat includes situations such as sending talcum powder in the mail with the intent that the recipient believes that it contains a harmful biological agent. The problem lies in the fact that, in this scenario, the perpetrator causes harm rather than merely having the intent to cause harm. Defense attorneys could make a convincing argument that sending talcum powder does not constitute a threat. Therefore, states need to include precise language in their

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400. N.J. STAT. ANN. § 2C:38-3 (West 2003).

401. *Id.* § 2C:33-3(b).

402. *Id.* § 2C:33-3(a).

403. MASS. ANN. LAWS. ch. 266, § 102A (Law. Co-op. 1970).

404. *See id.* § 102A 1/2(b) (2003) (defining a hoax substance as a "harmful chemical or biological agent, a poison, [or] a harmful radioactive substance").

405. According to WEBSTER'S THIRD NEW INT'L DICTIONARY 2382 (1993), a threat is defined as "[a]n expression of intention to inflict evil, injury, or damage."

statutes to avoid arguments over how to interpret the nature of a threat. Specific language will close textual loopholes and will result in the successful prosecution of relevant offenders.

To overcome the difficulties of articulating what constitutes a criminal hoax, legislatures could write statutes that only vaguely define anthrax hoaxes.<sup>406</sup> The most pressing concern, in terms of both fairness and necessary vagueness, is to ensure that citizens are given adequate notice of what the government is regulating and what standards will be used to determine if a criminal hoax has been committed.<sup>407</sup> Precise definitions of the criminalized actions and the controlling mental state will allow state legislatures to defeat future challenges on void-for-vagueness grounds.

### B. *Acti Rei*

As discussed above, comprehensive hoax crime statutes should include three separate *acti rei*: filing a false report, making a terroristic threat, and committing a hoax. Without all three *acti rei*, a state is not sufficiently equipped to prosecute the various types of crimes committed involving fake anthrax. Although some states categorize terroristic threats, false reports, and hoaxes as constituting one crime, this approach is not appropriate because it allows for disproportional punishments and stretches the crime too far by attempting to apply it to three very different acts. In Kentucky, for example, an individual is guilty of terroristic threatening if he or she makes a false report or commits a hoax crime.<sup>408</sup> These *acti rei* must be separated into distinct crimes in order to tailor punishments to fit the particular crime and to articulate clearly the acts that are necessary for commission of each crime. The following sections detail how states have dealt with the three *acti rei* separately and the problems they encountered in doing so. Their experiences will prove helpful in designing more effective legislation.

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406. See *Lanthrip v. State*, 218 S.E.2d 771, 773 (Ga. 1975) (denying that the Georgia terroristic threats statute is unconstitutionally vague, because "[t]he standard of guilt contained in the statute is not left to speculation or conjecture, but rather, is fixed and certain as to the conduct prohibited therein").

407. See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 58-60 (1999) (explaining that vagueness may invalidate a criminal law for either of two independent reasons: first, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (same).

408. KY. REV. STAT. ANN. § 508.075 (Banks-Baldwin 2002).



### 1. *Terroristic threats*

State legislators have particularly focused on creating terroristic threat statutes; consequently, most states already have relevant terroristic threat legislation on their books.<sup>409</sup> These statutes are vulnerable to due process challenges, however.<sup>410</sup> Specifically, legislators writing terroristic threat statutes must consider the due process challenges that their statutory provisions could face based on the vagueness of the term “threat.” A failure to do so has already resulted in state court findings of unconstitutionality.

In the successful due process challenge presented in *State v. Hamilton*,<sup>411</sup> for example, the Nebraska Supreme Court found its “terroristic threats” statute<sup>412</sup> unconstitutional because it provided that a person was guilty of making terroristic threats if he or she threatened to commit any crime likely to result in death or serious physical injury or substantial property damage to another person.<sup>413</sup> The court noted that it was uncertain from the language of the statute precisely what constituted a threat or crime likely to result in injury or damage.<sup>414</sup> The court noted further that the statute had no provision for distinguishing between threats made in jest and threats made in seriousness.<sup>415</sup>

In accordance with *Hamilton*, the Nebraska Legislature replaced its “terroristic threats” statute in 1986 with legislation similar to that recommended in the Model Penal Code.<sup>416</sup> The new statute made it illegal to threaten to commit a crime of violence with the specific intent to terrorize another as the result of the threat.<sup>417</sup> In a challenge to this provision in *State v. Schmailzl*,<sup>418</sup> the Nebraska Supreme Court held that it was not unconstitutionally vague.<sup>419</sup> The court recognized that the term “threat” was no more defined in the

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409. See, e.g., N.J. STAT. ANN. § 2C:12-3 (West 2003); NEB. REV. STAT. ANN. § 28-311.01 (Michie 2002).

410. See *supra* Part III.A.

411. 340 N.W.2d 397 (Neb. 1983).

412. NEB. REV. STAT. ANN. § 28-311 (repealed Michie 1986).

413. *Hamilton*, 340 N.W.2d at 399.

414. See *id.* (holding that the terms failed the Nebraska Supreme Court’s own standard for vagueness announced in *State v. Adkins*, 241 N.W.2d 655, 658-59 (Neb. 1976)).

415. See *id.* at 399 (questioning to whom the threat would have to be made in order to be taken seriously).

416. NEB. REV. STAT. ANN. § 28-311.01 (Michie 2002).

417. *Id.*

418. 502 N.W.2d 463 (Neb. 1993).

419. See *id.* at 466-67 (looking to the dictionary definition of “threat” as evidence of the common understanding of that term which gave fair notice as to what “threats” would be punished under the statute).

new statute than in the old one,<sup>420</sup> but looked to precedent from other states to support the proposition that the term "threat" was sufficiently understandable to a reasonable person to satisfy due process requirements.<sup>421</sup> Thus, while the language of a terroristic threats statute conceivably could be impermissibly vague in certain circumstances, some courts have rejected this argument in practice. As long as the statute requires that the offender have the specific intent of terrorizing another or placing another in fear of harm or damage, the statute is likely to be upheld.

## 2. *False reports*

While most states have terroristic threat statutes, false report statutes are not as common. Although states could attempt to prosecute perpetrators of false reports under hoax statutes, there are important differences between the elements of these two crimes. These differences were highlighted by a false report of anthrax in Connecticut in early 2002. Joseph Faryniarz, a Connecticut Department of Environmental Protection (DEP) worker, reported to DEP security the presence of anthrax on his computer, even though he knew the anthrax was fake and had been placed there as a hoax by a co-worker.<sup>422</sup> Faryniarz's false report caused the closure of part of downtown Hartford and resulted in a loss of one million dollars in worker productivity.<sup>423</sup> Authorities did not prosecute Faryniarz for the hoax, however, because he did not perpetrate it; he merely falsely reported it.<sup>424</sup> According to news reports, there was not enough evidence to support the charge against Faryniarz for making either a terroristic threat or a false report.<sup>425</sup>

Another interesting situation occurred two days after the first anniversary of September 11, when, at a restaurant in Georgia, a woman overheard three men of Middle Eastern descent discussing what she interpreted to be plans for a terrorist attack.<sup>426</sup> Believing

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420. *Id.* at 466.

421. *See id.* (citing *Lanthrip v. Georgia*, 218 S.E.2d 771, 773 (Ga. 1975), for its persuasive value and the proposition that a similar Georgia statute could be understood by a reasonable person seeking to comply with the law).

422. *See* Edmund H. Mahony, *Anthrax Hoax Case Falters*, HARTFORD COURANT (Conn.), June 5, 2002, at B1 (relating the events leading up to Joseph Faryniarz's false report of anthrax to Hartford's Department of Environmental Protection security personnel).

423. *Id.*

424. *Id.*

425. *See id.* (stating that Faryniarz's lawyer argued that Faryniarz was the victim of this hoax rather than the perpetrator who should be prosecuted for it).

426. *See* David M. Halbfinger, *Terror Scare in Florida: False Alarm, But Televised*, N.Y. TIMES, Sept. 14, 2002, at A10 (reporting that, while eating at a Shoney's restaurant,

that the men were planning to “blow something up,”<sup>427</sup> she alerted the Georgia State Patrol, which triggered a massive interstate response involving more than one hundred officers from more than twenty agencies as well as numerous media personnel.<sup>428</sup> When the police found no explosives in the men’s car, they handled the situation as a hoax rather than as a serious terrorist attack plan.<sup>429</sup> This incident demonstrates that a perpetrator’s activity can have characteristics of both a hoax and a false report, highlighting the need for both laws in order to ensure that individuals like these three men cannot escape punishment for wasting emergency response time and money. Failing to enact false reporting legislation allows individuals like Faryniarz and the three false Georgia plotters to escape punishment proportional to their crime, even though commission of the crime resulted in emergency costs and terrorized others.

### 3. *Hoax crimes*

Similar to the absence of false reporting statutes, many states do not have a useful hoax crime or hoax with a biological agent statute on their books. Even though the enormous wave of anthrax hoaxes following September 11 has subsided somewhat, the need for carefully crafted hoax legislation continues to be a significant concern because the threat of bioterrorism still looms large on the horizon.<sup>430</sup> Since hoaxes involving biological weapons of mass destruction became a legislative focus only in the aftermath of September 11, many technical issues still require resolution.

A major problem presented by anthrax hoax crimes is that the substances used to commit these crimes—such as talcum powder, aspartame, Kool-Aid, or flour—are not illegal to distribute,

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Eunice Stone heard the men in the booth next to her laughing about the events of September 11, 2001 and saying, “If they mourn Sept. 11, what will they think about Sept. 13?” The men then went on to say, “Do you think that will bring it down,” to which another replied, “Well, if that doesn’t bring it down, I have contacts to bring it down.”).

427. *Id.*

428. *See id.* (stating that the investigation lasted for more than seventeen hours, during which Interstate 75 was sealed off and the men’s car was searched for explosives).

429. *See id.* (reporting that, although the men had not been charged with anything, the situation would be pursued as a possible hoax).

430. *See Bersia, supra* note 23, at A11 (writing that the tensions between the United States and Iraq have fueled fears of possible bioterrorism, which could include anthrax, botulism, brucellosis, cholera, plague, and smallpox); *see also* David Johnston & Carl Hulse, *Finding of Deadly Poison in Office Disrupts the Senate*, N.Y. TIMES, Feb. 4, 2004, at A1; Carol Morello & Spencer S. Hsu, *Ricin Partially Shuts Senate*, WASH. POST, Feb. 4, 2004, at A1.

manufacture, purchase, or possess. Thus, if the hoax statute criminalizes the act of making fake anthrax readily accessible to others, the states should require that the provider had the intent or knowledge that the substance would be used as fake anthrax. Otherwise, people who have nothing to do with the crime could be found guilty.

Another difficulty facing legislatures constructing hoax statutes is the determination of whether the anthrax hoaxster must intend to scare or terrorize the general public, a specific number of people, or an individual person. States must be careful not to create a statute that could apply only to a particular number of people since this would exclude hoaxes in which the perpetrator targets a private individual. For this reason, using the term “another” or the words “any individual” to refer to the victim of an anthrax hoax provides statutory protection for all victims—from one person to the public at large.

A third issue requiring resolution is to determine the importance of the location of the hoax perpetration. State hoax bills have dealt with the issue of location in a variety of ways, from not mentioning it at all<sup>431</sup> to detailing every possible place in which an anthrax hoax might be carried out.<sup>432</sup> The specificity of locations could hinder the successful prosecution of an anthrax hoaxster if the hoax is perpetrated in a way that no one anticipated—much the same way that no one anticipated the attack plan used by the September 11 hijackers.

Unlike Washington House Bill 2759, which lists numerous locations in one statute, some states have created separate hoax provisions for each different location. North Carolina, for example, has created a separate hoax bill for schools.<sup>433</sup> While the perpetrator would be prosecuted under the hoax crime statute,<sup>434</sup> a student committing a hoax on school grounds would face an additional

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431. *E.g.*, H.B. 7439, 2001-2002 Leg. Sess. (R.I. 2002).

432. *E.g.*, H.B. 2759, 57th Leg., 2d Sess., § 3 (Wash. 2001):

Any person who maliciously places a chemical, biological, explosive, incendiary, flammable, or radiological substance or device in, upon, under, against, or near any building, vehicle, roadway, bridge, ferry, vessel, canal, train, railroad track, airplane, public or private electric, water, sewer, gas, telecommunications, or other utility production or transmission facility, structure or equipment, computer system or network, or any other structure, utility, common carrier, or mode of transportation, in such a manner or under such circumstances as to destroy, contaminate, damage, or injure it if diffused, ignited, or exploded is guilty of [the crime of malicious placement].

433. N.C. GEN. STAT. § 115c-391(4)(d)(3) (2003).

434. *Id.* § 14-288.24.

punishment of expulsion from school for one year.<sup>435</sup> Even though the statutes are distinguished by location, however, the penalty is often the same for each. States following this pattern should decide why the specific location is significant and whether separate provisions for each location are really necessary. Otherwise, these states seem to be making legislation without fully considering the desired objective, such as punishing a hoaxster who targets an elementary school more severely than one who targets an individual's home.

### C. *Problems with States' Current Mens Rea Requirements*

Another critical question that legislators must consider when drafting criminal hoax statutes is what mental state a perpetrator should have in order to be held liable for a criminal hoax.<sup>436</sup> Drafters have variously chosen to adopt a specific intent standard that focuses on the mind of the perpetrator,<sup>437</sup> a reasonableness standard focusing on the mind of the victim,<sup>438</sup> or to eliminate the mens rea requirement entirely.<sup>439</sup>

#### 1. *Specific intent*

Many state hoax statutes that contain a specific intent mens rea requirement that focuses solely on the perpetrator's intent to terrorize, deceive, frighten, scare, or otherwise intimidate, exclude hoaxes made in jest.<sup>440</sup> Consequently, states wishing to enact statutes capable of punishing hoaxsters, regardless of the perpetrator's mens rea, must draft provisions that encompass both situations. Determining the mens rea requirement based solely on whether the victim believed the anthrax is real is insufficient, because this does not separate a hoax done in jest from one done with malice. Without

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435. *Id.* § 115c-391(4)(d)(3).

436. See Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and Under the Model Penal Code*, 18 GA. ST. U. L. REV. 341, 341 (2001). Professor Batey argues that American jurisdictions take two basic approaches to the mens rea element of a crime: while a majority of the states and the federal system allow courts to construe crimes as requiring specific intent, general intent, strict liability, or one of the seemingly infinite shades of meaning along the continuum on which these three concepts reside, a substantial minority use the structure reflected in § 2.02 of the Model Penal Code, which deploys five discrete levels of culpability—purpose, knowledge, recklessness, negligence, and strict liability—according to relatively strict rules of judicial construction. *Id.*

437. *E.g.*, 18 U.S.C. § 35(b) (2002); FLA. STAT. ANN. § 790.166 (West 2002).

438. See, *e.g.*, CAL. PENAL CODE §§ 11418.1, 11418.5 (West 2003) (focusing on the perception of the victim to determine whether a threat is immediate and specifically targeted against the individual who receives it).

439. See MICH. STAT. ANN. § 750.200j (Michie 2001).

440. *E.g.*, 18 U.S.C. § 35(b); FLA. STAT. ANN. § 790.166.

legislative attention to this important issue, a hoaxster could argue that he or she honestly believed that the victim would know that the substance was not anthrax, regardless of whether the actor committed the act with malice or terroristic intent.

The drawback of a specific intent requirement<sup>441</sup> is that hoaxes made in jest may not meet this stringent threshold. For example, the prankster who places white powder on a classroom table hoping that someone mistakes it for anthrax would fail to meet the specific intent requirement if he or she intended it only as a joke rather than to scare by knowingly placing the substance.<sup>442</sup> Concern about overzealous prosecution of childish pranks is a good reason to adopt a specific intent requirement in any model hoax crime legislation.<sup>443</sup>

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441. Another potential criticism of a hoax crime bill that retains a specific intent requirement could be the same criticism that has plagued stalking statutes in recent years. See, e.g., Carol E. Jordan et al., *Stalking: Cultural, Clinical and Legal Considerations*, 38 BRANDEIS L.J. 513, 550-52 (2000) (discussing the relationship between stalking and assault and the difficulty with finding a mens rea that fits proposed stalking legislation). Academics have commented that an ongoing problem with stalking legislation and stalking laws already on the books is that they require that the perpetrator have the specific intent to injure or instill fear in the victim. See Joseph C. Merschman, Note, *The Dark Side of the Web: Cyberstalking and the Need for Contemporary Legislation*, 24 HARV. WOMEN'S L.J. 255, 269-71 (2001). Their position is that the major problem with requiring that the perpetrator have the specific intent to threaten the victim is that the government is left with deciding between prosecuting a lesser included offense, such as harassment, or taking on the added burden of proving intent. *Id.* In response, some academics have advocated for a less stringent reasonableness standard for stalking statutes. They would require, for example, that the person knew or reasonably should have known that his or her conduct would cause an individual to reasonably fear for his or her safety. See, e.g., Jordan et al., *supra*, at 576-77. The theory is that both having a specific intent requirement and having a reasonable apprehension of a weapon (or stalker) provide sufficient notice to the defendant that his or her conduct is illegal, but only the reasonableness standard is practical enough to make many prosecutions feasible. *Id.* Some states have responded to such criticism by attempting to sidestep specific intent and completely eliminating any mens rea requirement. See, e.g., MICH. STAT. ANN. 750.200j (Michie 2001); S.B. 998, 104th Reg. Sess. (Fla. 2002) (enacted) (eliminating intent for the hoax). But see Katherine R. Tromble, Note, *Humpty Dumpty on Mens Rea Standards: A Proposed Methodology for Interpretation*, 52 VAND. L. REV. 521, 526-27 (1999) (arguing that the first principle the Supreme Court established regarding mens rea in federal criminal statutes was a presumption in favor of mens rea standards generally).

442. While Florida has adopted "intent to deceive" as the requisite mens rea for the crimes involving false reporting, see FLA. STAT. ANN. §§ 790.163, 790.164 (West 2002), the state has opted for strict liability for hoax crimes, see FLA. STAT. ANN. § 790.166(3) (West 2002); see also *infra* notes 447-449 and accompanying text (addressing strict liability). In 2000, the Florida Legislature enacted a law that included intent to deceive as the mens rea for hoax crimes. See FLA. STAT. ANN. § 790.166(3) (West 2000) ("intent to deceive or otherwise mislead another into believing that the hoax weapon of mass destruction will cause terror, bodily harm, or property damage"). In 2002, the Legislature adopted a bill eliminating the intent-to-deceive requirement. See S.B. 998, 2002 Reg. Sess., § 4 (Fla. 2002) (codified at FLA. STAT. ANN. § 790.166(3) (West 2002)).

443. See Kelly, *supra* note 32, at B.01 and accompanying text; see also Salmon, *supra* note 299, at B1 (stating that the two boys could become wards of the state for

## 2. *The reasonableness standard and the victim's mens rea*

A reasonableness standard requires the perpetrator to "cause another to reasonably believe" that he or she has been exposed to a weapon of mass destruction.<sup>444</sup> However, adoption of this standard does not take into account the perpetrator's malevolence. Because the perpetrator's actus reus and mens rea are the same whether a reasonable or unreasonable person experiences fear, statutes should focus on the hoaxster's mens rea when determining the severity of the punishment.

For the same reasons, a mens rea requirement that focuses on the victim's mindset should also be rejected. Such a requirement allows for too much unpredictability in prosecuting hoaxsters because it emphasizes the individual's subjective response to the hoax.<sup>445</sup> A better approach would be to presume that the victim will be scared or terrorized and to examine whether this was the perpetrator's intent.

Another reason to reject the reasonableness standard and not focus on the victim's mindset is that this standard frees from liability the joking hoaxster who tells his or her victim ahead of time that he or she will be receiving fake anthrax. These hoaxsters still risk causing an emergency response and terrorizing victims or unintended targets; therefore, they should at the least be ordered to pay a substantial fine.<sup>446</sup>

## 3. *Strict liability*

States must strike a balance between statutes with specific intent mens rea requirements that under-punish and strict liability statutes that over-punish. When states' hoax statutes have no mens rea requirement, perpetrators will be over-punished because strict liability standards do not differentiate between hoaxes that are done in jest and those done with malice. Thus, strict liability hoax crimes in most states carry penalties that are not proportional to hoaxes made in jest. This is a real concern because both Florida<sup>447</sup> and

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committing an anthrax hoax that they intended as a Halloween prank).

444. E.g., S.B. 265, 2002 Reg. Sess., § 7(a) (Ala. 2002).

445. See Mike Hoyem, *Jury Acquits Man in Anthrax Hoax*, NEWS-PRESS (Fort Meyers, Fla.), Aug. 21, 2002, at 1A (reporting the story of a Florida man who was acquitted on a charge of using a hoax weapon of mass destruction after sprinkling white powder on his best friend's mail, because the neighbor testified that the powder did not scare him).

446. See, e.g., Halbfinger, *supra* note 426, at A10 (discussing how the report led to the authorities sealing off an interstate highway and triggering an immense law enforcement response).

447. See FLA. STAT. ANN. § 790.166(3) (West 2002) ("Any person who, without lawful authority, manufactures, possesses, sells, delivers, mails, sends, displays, uses, threatens to use, attempts to use, or conspires to use, or who makes readily accessible

Colorado<sup>448</sup> enacted strict liability hoax biological weapon statutes in the spring of 2002 that categorize the crime as a felony.<sup>449</sup> Strict liability should be used only if the punishment for hoaxes done in jest is reduced to payment of restitution, a fine, or both.

4. *Due process problems with mens rea requirements: unduly vague or overly broad mens rea*

Vague and broad mens rea requirements negate the purpose of creating a hoax statute because they are no more tailored to hoaxes than are the states' disorderly conduct statutes. The various mens rea standards include the intent to alarm or harass, to cause inconvenience, annoyance, alarm, unrest, personal discomfort, panic, or for the purpose of disturbing people.<sup>450</sup> Because these mens rea requirements could result in over-punishment and arbitrary law enforcement,<sup>451</sup> the hoax law should be specific enough that individuals will know whether it applies to them and police are aware of the limitations of their power.

D. *Overly Severe and Disproportional Penalties*

After determining the mens rea and actus reus requirements for a hoax crime, the legislators' next step is to decide how to punish criminal hoaxes. Some states have attempted to deter this behavior by imposing a single penalty that does not differentiate among different types of hoaxes—e.g., jest vs. malice.<sup>452</sup> Other states and the

to others, a hoax weapon of mass destruction commits a felony of the second degree.”).

448. See COLO. REV. STAT. ANN. § 18-12-109(7) (West 2002) (“Any person who manufactures or possesses or who gives, mails, sends, or causes to be sent any false, facsimile, or hoax explosive or incendiary device or chemical, biological, or radiological weapon to another person or places any such purported explosive or incendiary device or chemical, biological, or radiological weapon in or upon any real or personal property commits a class 5 felony.”).

449. See FLA. STAT. ANN. § 790.166(3) (West 2002) (punishing the offense as a second-degree felony); see also COLO. REV. STAT. ANN. § 18-12-109(7) (West 2002) (punishing the offense as a Class 5 felony).

450. See, e.g., OHIO REV. CODE ANN. § 2917.31(A)(1) (Anderson 2003) (“No person shall cause the evacuation of any public place, or otherwise cause serious public inconvenience or alarm, by doing any of the following: Initiating or circulating a report or warning of an alleged or impending fire, explosion, crime, or other catastrophe, knowing that such report or warning is false.”); H.R. 2759, 57th Leg., Reg. Sess. (Wash. 2002) (indicating that an individual is guilty of malicious intimidation or harassment if he or she “maliciously exhibits an imitation, fake, or hoax . . . biological . . . substance and who intends to, and does, intimidate or harass a person”).

451. Proving that an individual intended to cause public inconvenience or one of the other vague intents is an extremely low threshold when the resulting charge is a felony.

452. See *supra* Part III (examining state legislation adopting a strict liability



federal government have recognized the significant difference between these two *mentes rea*e.<sup>453</sup> Examples of how states punish hoax crimes vary from lengthy<sup>454</sup> and moderate<sup>455</sup> prison terms to misdemeanors only.<sup>456</sup> Other states have diversified their punishment schemes. Pennsylvania, for example, provides that an individual is guilty of: a first-degree misdemeanor if he threatens to use a weapon of mass destruction or falsely reports the placement of a weapon of mass destruction; a third-degree felony if this conduct causes the "occupants of a building, place of assembly or facility of public transportation to be diverted from their normal or customary operations"; or a second-degree felony if this conduct takes place at the time of a state of emergency and the "report or threat causes disruption to the operations of any person, business entity or governmental agency."<sup>457</sup>

Although hoax perpetrators deserve a fitting punishment, many states have enacted penalties that are too severe to punish a criminal whose acts could not have resulted in injury or death to the victim.<sup>458</sup>

standard, according to which all offenders receive the same punishment, regardless of the hoaxster's *mens rea*).

453. See, e.g., 18 U.S.C. § 35 (2002) ("Imparting or Conveying False Information") (providing a maximum civil penalty of \$1,000 for imparting or conveying false information without any intent, under the crimes section of the aircraft and motor vehicles chapter, versus a five-year prison term or a fine, or both, for imparting or conveying false information "willfully and maliciously, or with reckless disregard for the safety of human life").

454. See, e.g., MICH. COMP. LAWS ANN. § 750.543m (West 2003) (providing that an individual who knowingly makes false reports of terroristic acts will face possible incarceration for up to twenty years in prison, a \$20,000 fine, or both); MINN. STAT. ANN. § 609.712(4) (West 2003) (allowing up to ten years' imprisonment, a fine of not more than \$20,000, or both, for any individual who, with the intent to terrorize, displays a "simulated weapon of mass destruction," threatens to use a weapon of mass destruction, or falsely reports the placement of a weapon of mass destruction).

455. CAL. PENAL CODE § 11418.1 (West 2003) (providing that any individual who "gives, mails, sends, or causes to be sent any false or facsimile of a weapon of mass destruction to another person . . . with the intent to cause another person to fear for his or her own safety, or for the personal safety of others," and thereby causes the individual to be placed in "sustained fear," will face up to one year in the county jail, or sixteen months, or two or three years, in the state jail, and a fine of up to \$250,000).

456. See, e.g., H.B. 263, 2002 Leg., Reg. Sess. (Ala. 2002) (providing that a person is guilty of a Class A misdemeanor if he or she "manufacture[s], possess[es], transport[s], or distribute[s] a hoax device or replica of a . . . biological weapon with the intent to cause another to reasonably believe that the hoax device or replica . . . is a . . . biological weapon").

457. 18 PA. CONS. STAT. § 2715 (2003).

458. See Mike Hoyem, *Inmate Who Tried to Mail Fake Anthrax Gets 20 Years*, NEWS-PRESS (Fort Myers, Fla.), Oct. 9, 2002, at 3B (stating that Cory T. Perry, a Lee County, Florida inmate, was sentenced to twenty years in prison when he tried to mail letters laced with Metamucil and bearing the phrase "Time to Die Today" to Lee County businesses and New York syndicated columnist "Miss Manners" while he was in jail on other charges); Ronson, *supra* note 12, at 16 (reporting the story of Northern Illinois

In Minnesota, for example, hoaxsters face a prison sentence of up to ten years, a fine of up to \$20,000, or both.<sup>459</sup> In Michigan, a perpetrator of a terroristic threat or false report could be imprisoned for up to twenty years, fined up to \$20,000, or both.<sup>460</sup> These penalties seem especially severe when viewed in comparison to a recent anthrax hoax case in England in which the perpetrator was sentenced to 100 hours of community service.<sup>461</sup>

However, the punishments facing perpetrators in states without hoax biological weapon statutes are even more extreme. For instance, Dean Wilber faces a maximum sentence of life in prison for sending a fake anthrax letter to Attorney General John Ashcroft.<sup>462</sup> But the heaviest sentence by far awaits Clay Waagner, the "undisputed anthrax king."<sup>463</sup> Waagner faces a several-thousand-year sentence—which might be the longest sentence in United States history—mostly for sending more than 700 letters laced with fake anthrax to abortion clinics.<sup>464</sup> Waagner has stated that he feels his anthrax hoax crusade was highly successful because it cost him less than \$300 and, according to his own estimates, 2,300 babies were not aborted due to his attacks.<sup>465</sup> Such an extreme sentence is not warranted for someone who did not kill anyone, especially

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University Student Bryan Magnall, who was expelled and faces up to five years incarceration after being charged with aggravated battery and disorderly conduct for running around campus on Halloween wearing a cape, waving a manila envelope of flour, and shouting, "Free anthrax! Get it while it's cheap!"; the charge was upgraded to "aggravated" because he was wearing a mask during the time of the assaults).

459. MINN. STAT. ANN. § 609.712(4) (West 2003). Similar legislation exists in Oklahoma and Vermont. See OKLA. STAT. ANN. tit. 21, § 1268.4 (West 2003) (providing a maximum state prison term of ten years, restitution to the victim, and reimbursement of emergency response costs for individuals who commit terrorism hoaxes); VT. STAT. ANN. tit. 13, § 3502(g) (2003) (punishing individuals who place hoax weapons of mass destruction with up to five years' incarceration, a maximum fine of \$10,000, or both).

460. MICH. COMP. LAWS ANN. § 750.543m (West 2003).

461. See Ronson, *supra* note 12, at 16 (reporting that the hoaxster was a kitchen worker in Bath who placed sugar in an envelope for the chef).

462. See Matthew B. Stannard & Chuck Squatriglia, *Anthrax-hoax suspect held in Oakland*, S.F. CHRON., May 31, 2002, at A1 (stating that the greeting card filled with baby powder that Wilber mailed from Laramie, Wyoming with a one-cent stamp broke open in a post office in Cheyenne, Wyoming).

463. See Ronson, *supra* note 12, at 16 (stating that the prosecution's goal was to give him a number of years for each hoax that he committed). Waagner's prior convictions included weapons violations, escaping from jail, and committing robbery at a gas station. *Id.*

464. See *id.* (indicating that 300 of the letters contained the nontoxic chemical "BT," which has the same biological composition of anthrax—meaning that tests for anthrax could yield a positive result).

465. See *id.* (relating Waagner's statement that he was prompted to commit the hoaxes after his daughter suffered a miscarriage, which was when he claimed God said to him, "How can you grieve over this one when millions are killed every year and you do nothing?").

considering the fact that his sentence will be greater than that served by serial killers and mass-murderers.

A few states punish hoaxes more severely than terroristic threats and false reports without explaining why one is considered more serious than the others.<sup>466</sup> States also punish offenses disproportionately from case to case. For example, Terry Olson of Utah faces up to life in prison without parole for lacing anthrax letters with Nesquik and sugar at his house and reporting to authorities that he received them in the mail.<sup>467</sup> In contrast, Lucy Manifold, a sixth grade teacher in Ohio, was removed from her job and fined \$150 after she placed a hoax letter filled with powdered lime in the school's outgoing mail tray.<sup>468</sup> Although neither of the letters was sent in the mail, Manifold actually took a much greater risk than Olson by attempting to mail the letter and placing it in the mailroom at school.<sup>469</sup> The only major difference in their stories is that the FBI was alerted in Olson's case but not in Manifold's.<sup>470</sup>

#### IV. RECOMMENDATIONS

##### A. Introduction

The most effective means of protecting the country from future hoax crimes requires uniform, nationwide federal legislation.<sup>471</sup> State

466. Compare VT. STAT. ANN. tit. 13, § 3502(g) (2003) (providing that the penalty for placing a hoax weapon is imprisonment for not more than five years, a fine of not more than \$10,000, or both), with *id.* at § 3503(b)(2) (2003) (providing that the punishment for threatening to use a weapon of mass destruction is imprisonment for not more than two years, a fine of not more than \$5,000, or both).

467. See Ronson, *supra* note 12, at 16 (quoting Terry Olson's lawyer, Ron Yengich, as stating: "[I]t's really difficult to go after the real perpetrator of the anthrax crimes. We use the criminal law to scapegoat a lot in the U.S. . . . But contrary to what the assistant U.S. Attorney has said, he didn't 'wreak havoc in his community,' nor did he 'scare the entire state of Utah.'").

468. See *id.* (stating that Manifold attempted to send the letter to her brother, with whom she frequently played practical jokes; the powdered lime was accompanied by a note that said, "From your new friend Bin!").

469. If Manifold's letter had opened while school was in session and she could not be located, the entire school might have been evacuated and emergency personnel might have been called to the scene. In addition, if the letter had been placed in the mail and some of the lime had seeped out in a post office, the post office most likely would have been shut down and workers would have been treated with Cipro. Further, her brother could have been terrorized if he did not realize that the letter had been a joke from his sister. Conversely, other than inconveniencing emergency response personnel and adding to the national anthrax-hoax furor, Olson's hoax did not involve any victims or possible second-party victims, other than himself.

470. See Ronson, *supra* note 12, at 16 (stating that, in Manifold's case, the principal alerted only the local police, whereas in Olson's case the Hazardous Materials Team was sent to his house, followed by the F.B.I. the next day).

471. Although federal legislation is the optimum solution, uniform state laws are the next best option. Consequently, the recommendations made in this section

hoax laws based on a model statute would be subject to fifty different interpretations by state courts, and some states might not adopt the statute in its entirety<sup>472</sup>—or at all. Adopting a single federal statute would also reduce the problems with disproportional punishments that currently exist due to prosecution at the state level.<sup>473</sup> In particular, the federal government must consider the *actus reus* and *mens rea* that ought to be criminally culpable, the penalties for such crimes, and the potential defenses to criminal charges under the new statutes.

Predicting what shape and form future hoax crimes will take is paramount to drafting effective hoax crime legislation.<sup>474</sup> Congress must carefully decide what acts should be punished, because a sweeping bill might criminalize otherwise innocuous or equivocal activity<sup>475</sup>—in other words, conduct that harms neither the individual nor society.<sup>476</sup> It is a delicate balance, however, for too much precision could allow some hoaxsters to go unpunished.

Moreover, enacting legislation without properly identifying what Congress specifically seeks to deter could create vagueness problems.<sup>477</sup> Because this is an emerging area of criminal regulation, legislative drafters must focus on what they want to criminalize and whether the civil or administrative regime outside the criminal justice system should handle the matter. A failure to answer these questions could create tyrannical laws that would not differentiate between harmless jokes and malicious assaults, thereby undermining the legitimacy of future regulation.<sup>478</sup>

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apply equally to the federal and state governments.

472. See Coyle, *supra* note 304, at A1 (stating that, although the Emergency Health Powers Act, which is a model bioterrorism response law, has been introduced in thirty-six states and enacted by eighteen states and the District of Columbia, only Delaware, Hawaii, Maine, and the District of Columbia have adopted the full version of the law).

473. See *supra* Part IV.D (discussing problems with the “overly severe and disproportional penalties” imposed by current state hoax legislation).

474. See *supra* Part I (discussing the variety of methods that anthrax hoaxsters have used to consummate their hoaxes following September 11).

475. See *State v. Schmailzl*, 502 N.W.2d 463, 467 (Neb. 1993) (stating that Nebraska’s terroristic threats statute is constitutional because it does not violate the U.S. Supreme Court’s interpretation of overbreadth, which is implicated when “a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals”) (internal quotation marks omitted).

476. See, e.g., Pedicini, *supra* note 264, at D1 (stating that, although the boy who spilled the Kool-Aid in the school bathroom has already been charged with disrupting an educational institution, which is a misdemeanor, he could face second-degree felony charges for possessing a hoax weapon of mass destruction).

477. See *supra* Parts III.A, IV.A (examining void-for-vagueness challenges involving hoax crime legislation).

478. See, e.g., Salmon, *supra* note 299, at B1 (stating that the three boys who meant

## *B. Actus Reus*

### *1. Introduction*

It is essential for Congress to define succinctly the precise conduct it aims to criminalize. Otherwise the government risks the appearance of prosecuting without specific direction, instruction, or limits on prosecutorial discretion. Lumping vague definitions into legislation could also require judicial interpretation to actually “make” the law, potentially resulting in inconsistent rulings across the country.

Wisconsin’s attempted approach to hoax crimes was well-conceived criminal legislation because it had the foresight to define three distinct incarnations of the criminal hoax: false reports, hoax crimes, and terroristic threats.<sup>479</sup> The Kansas Legislature built on this foundation with an approach that provides several advantages.<sup>480</sup> First, the legislature drafted the statute in plain language that requires only minimal judicial interpretation to effectuate the aims of the statute.<sup>481</sup> Instead of relying on statutory language that may become bogged down in its own textual ambiguity<sup>482</sup>—such as

to play a prank on their friends by placing letters containing fake anthrax in their mailboxes could now become wards of the state). Although the boys’ joke was in poor taste, separating them from their parents for committing a hoax that resulted in no real harm to anyone is a punishment far too severe a deterrent for the crime. Such an extreme punishment is likely to result in a loss of public support for the government’s goal of prosecuting hoaxsters to the fullest extent of the law.

479. See S. 363, 95th Leg., Reg. Sess. (Wis. 2002) (indicating that the bill failed to pass in the Senate, “pursuant to Senate Joint Resolution 1”).

480. Kansas proposed two bills that, when combined, provide a complete and effective legislative solution for addressing anthrax hoaxes. See S.B. 594, 79th Leg., Reg. Sess. (Kan. 2002) (penalizing terroristic threats and false reports); H.B. 2986, 79th Leg., Reg. Sess. (Kan. 2002) (addressing false reports of weapons of mass destruction and hoaxes involving biological weapons of mass destruction).

481. See Kan. S.B. 594 (defining false reports as “communicating by any means of communication to any person or group of persons, a report, knowing or having reason to know the report is false, that causes any person to reasonably believe that there is located at any place or structure whatsoever any . . . biological . . . weapon of mass destruction”). The bill defines terroristic threat as “any threat to commit the crime of terrorism causing reasonable expectation or fear of imminent commission of such offense.” The bill defines terrorism as “the commission of, the attempt to commit or conspiracy to commit any felony with the intent to intimidate or coerce a civilian population, influence the policy of a unit of government or affect the conduct of a unit of government.” See Kan. H.B. 2986 (providing that a false report is committed in the same manner as delineated by Kan. S.B. 594; also providing that a weapon of mass destruction hoax is committed by “concealing, placing or displaying any device, object, machine, instrument or artifact, with intent to perpetrate a hoax, causing any person to reasonably believe such device, object, machine, instrument or artifact to be a . . . biological . . . weapon of mass destruction”).

482. Cf., e.g., U.S. DEP’T OF JUSTICE, THE UNITED STATES ATTORNEYS’ MANUAL, TITLE 9, CRIMINAL RESOURCE MANUAL NO. 2402 (2d ed. 2000) (explaining that the ambiguity in the Hobbs Act has allowed it to be interpreted and applied in ways that

defining what constitutes a weapon of mass destruction—the statute clearly explains the prohibited conduct.<sup>483</sup> Second, the breadth of the Kansas statute covers three distinct offenses that have been associated with hoax crimes post-September 11: false reporting, use of hoax weapons, and terroristic threats.<sup>484</sup> Third, by creating distinct provisions for the different crimes associated with criminal hoaxes, it portrays a regime that is not aimless, overly vague, or ill-defined.

## 2. *Weapons of mass destruction definition for the three acti rei*

An effective hoax statute must clearly and succinctly define “weapons of mass destruction” and “hoax weapons of mass destruction.” An effective approach would be to define the former as “any device that uses radiological, biological or chemical agents or nuclear materials to cause harm” and the latter as “any replica or facsimile of a weapon whose likeness is such that a reasonable person would perceive the weapon to be a real weapon of mass destruction.”<sup>485</sup> Adopting a definition that is broad enough to include any device that a reasonable person would perceive to be a real weapon of mass destruction allows the statute to apply to the use of later-developed types of weapons of mass destruction that legislators presently are unable to anticipate. This is necessary to avoid the problems that some states now face when prosecuting anthrax hoaxsters under hoax statute definitions that are limited to facsimile bombs.<sup>486</sup>

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make little sense when considering the original purpose and intent of the Act), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm02402.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02402.htm). The main thrust of the Hobbs Act, 18 U.S.C. § 1951, is that it “prohibits actual or attempted robbery or extortion affecting interstate or foreign commerce ‘in any way or degree.’” *Id.* Additionally, the Act outlaws robbery and extortion conspiracies, but fails to refer to 18 U.S.C. § 371, the general federal conspiracy statute. *Id.* The Hobbs Act provision that proscribes “physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section,” relates only to violence that serves to further the commission of a robbery or extortion. *Id.* However, in *United States v. Franks*, 511 F.2d 25, 31 (6th Cir. 1975), the court disagreed with the proposition that the statute prohibits “all physical violence obstructing, delaying, or affecting commerce as contrasted with violence designed to culminate in robbery or extortion.” *Id.* Furthermore, even though the original purpose of the Act was to decrease racketeering in labor-management disputes in the 1940s, the extortion statute is often employed in cases of “public corruption, commercial disputes, and corruption directed at members of labor unions.” *Id.* Even so, finding a violation of the Hobbs Act does not necessitate “proof of ‘racketeering.’” *Id.*

483. See *supra* note 481 (defining the crimes prohibited by Kansas’ legislation).

484. See *id.*

485. See *infra* PROPOSED STATUTE § A.

486. See, e.g., Assemb. B. 1969, 210th Leg. (N.J. 2002) (enacted) (providing penalties for biological weapon threats, terroristic threats, false public alarms, and placement of “false or facsimile bombs,” without mentioning hoax weapons of mass

### 3. *False reports actus reus*

The actus reus that should be proscribed for false reports is to “falsely report the location or placement at any place or structure of a weapon of mass destruction.”<sup>487</sup> This actus reus is broad enough to cover any type of false report, whether the person places the fake anthrax himself or herself and then reports its location or reports that someone else has exposed him or her to anthrax although the individual knows this to be false. This type of language, modeled after the proposed Alabama legislation, would differentiate those who create hoax devices from those who report their existence.<sup>488</sup> This is an important difference, particularly in the context of recent anthrax hoaxes in which the “manufacture” of hoax devices might amount to nothing more than the placement of flour in an envelope.<sup>489</sup> In addition, the lack of specified locations for the perpetration of false reports eliminates potential loopholes that could be created in legislation that details false report locations with extreme particularity.<sup>490</sup>

### 4. *Hoax crime actus reus*

Determining which acts should be considered criminal hoaxes poses a difficult problem due to the degree of unpredictability accompanying hoaxes.<sup>491</sup> Unlike simple assault, whose statutes focus on the immediacy of the harm to the victim,<sup>492</sup> criminal hoaxes place

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destruction).

487. See *infra* PROPOSED STATUTE § B.1.

488. Compare H.B. 263, 2002 Leg., Reg. Sess., § 7(a) (Ala. 2002) (requiring that the offender “manufacture, possess, transport, or distribute” the hoax device), with *id.* § 7(c) (requiring that the offender “communicate or transmit” that the hoax device is operational).

489. See, e.g., Lacoe, *supra* note 39, at 1A (reporting on the arrest of Emily Forman for placing cornstarch and a blank piece of paper in an envelope).

490. See, e.g., VT. STAT. ANN. tit. 13, § 3502(g) (2003) (providing that a person is guilty of possession and use of weapons of mass destruction if he or she “knowingly and intentionally places a hoax weapon in any public place, building, house, residence, facility of public transport, vehicular conveyance, train, ship, boat, aircraft, dam or reservoir for storing water”); H.R. 375, 141st Gen. Assemb. (Del. 2002) (providing that a person is guilty of placing a hoax weapon of mass destruction when he or she places such a substance “in a building, public place or place of assembly or facility of public transportation or school, college or university”).

491. Legislators may have to keep a generic definition of hoax in order to have a malleable standard that meets the growing frequency and bizarre incarnations of the criminal hoax. See MODEL PENAL CODE § 211.3 (1985) (dealing with situations involving threats to an individual or a group and serving as an example of a generically written code that might be broad enough to encompass a variety of hoax situations).

492. See *id.* § 211.1 (1985) (providing that an individual assaults another when he “attempts by physical menace to put another in fear of imminent serious bodily injury”).

the victim in fear because of a harm that might later be manifested, such as contracting inhalation anthrax.<sup>493</sup> Because there is no immediate harm to the victim save the feeling that some harm or danger will occur in the future, knowing which actions to criminalize and which to consider pre-existing crimes, like assault, will be a complicated task. Legislators should look to Kansas for guidance; the Kansas Legislature created comprehensive, thoughtful criminal hoax legislation that correctly describes what conduct to punish as criminal.<sup>494</sup>

The *actus reus* that should be proscribed for hoax crimes is to “conceal, distribute, place, mail, display, or use a hoax weapon of mass destruction to commit or cause to be committed an act likely to cause an individual to believe that he or she has been exposed to a weapon of mass destruction.”<sup>495</sup> This *actus reus* expands on the Kansas bills by adding the acts of mailing, distributing, and using a hoax weapon of mass destruction—some of the more common forms of conduct used to perpetrate hoaxes following September 11.<sup>496</sup> Furthermore, it requires conduct that is likely to cause an individual to believe that he or she was exposed to a weapon of mass destruction, rather than to believe that the device actually is a weapon of mass destruction.<sup>497</sup> This language would cover situations in which someone receives a note indicating that he or she has been exposed to anthrax, regardless of whether real or hoax anthrax accompanies the note.<sup>498</sup>

##### 5. *Terroristic threats actus reus*

The *actus reus* that should be proscribed for a terroristic threat should be to “threaten to use a weapon of mass destruction.”<sup>499</sup> I recommend this language because it creates an offense based on

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493. See Kellman, *supra* note 25, at 433-34 (describing the possible consequences of coming into contact with anthrax).

494. See *supra* note 481.

495. See *infra* PROPOSED STATUTE § B.2.

496. Compare H.B. 2986, 79th Leg., Reg. Sess. (Kan. 2002) (including only the acts of “concealing, placing or displaying” a hoax weapon of mass destruction), with *supra* Part I (surveying the variety of hoaxes perpetrated following September 11 that involved mailing, distributing, or using a hoax weapon of mass destruction).

497. Compare MISS. CODE ANN. § 97-27-12(1) (2003) (providing that it is illegal for a person to “commit an act intended to cause another person or persons to falsely believe that [they] have been exposed to a harmful biological substance”), with Kan. H.B. 2986 (requiring the victim to “reasonably believe” that the hoax weapon is a real biological weapon of mass destruction).

498. This provision specifically addresses cases in which an individual receives a threatening letter asserting that he or she has been exposed to anthrax, even though the victim cannot detect a visible hoax substance.

499. See *infra* PROPOSED STATUTE § B.3.



making threats alone. This is different from many states' proposed legislation, which combine terroristic threats with hoaxes and false reports.<sup>500</sup> Further, this *actus reus* allows prosecution irrespective of the location in which the threat is supposed to be consummated.<sup>501</sup>

### C. *Mens Rea*

Most importantly, Congress should develop a *mens rea* standard based on the defendant's, rather than the victim's, state of mind. The perpetrator should be just as culpable whether or not the victim is actually put in fear; the perpetrator should also be liable for scaring unintended targets.<sup>502</sup>

#### 1. *False reports mens rea*

The *mens rea* that should be proscribed for false reports is the "intent to threaten, scare, or coerce" the victim receiving the false report.<sup>503</sup> This *mens rea* requirement avoids any consideration of whether the victim actually felt threatened, scared, or coerced.

#### 2. *Hoax crime mens rea*

There should be three separate *mentes reae* for hoax crimes, in order to cover the intent to terrorize, the intent to scare, and the intent to perpetrate a joke.<sup>504</sup> Regarding intent to terrorize, the *mens rea* that should be proscribed is the "intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government."<sup>505</sup> This *mens rea* best applies to situations in which the

500. See, e.g., KY. REV. STAT. ANN. § 508.075(1)(a)-(b) (Banks-Baldwin 2002) (providing that an individual is guilty of terroristic threatening if he or she makes false statements about the placement of a weapon of mass destruction or places a counterfeit weapon of mass destruction).

501. See, e.g., S. 5823, 224th Leg., Reg. Sess. (N.Y. 2001) (separating the offense of placing a facsimile hazardous substance at a school, public building, or public place from doing the same at a sports stadium or arena, mass transportation facility, or enclosed shopping mall, even though both are Class D felonies).

502. Compare Thompson, *supra* note 161, at A3 (discussing Kinley Gregg's acquittal, which was influenced in part by the fact that no one was scared by her hoax), with Neely Tucker, *Capitol Police Officer Convicted of Staging Anthrax Hoax*, WASH. POST, Nov. 22, 2002, at A17 (reporting the federal jury conviction of Capitol Police Officer James Pickett on one felony count of making false statements, even though no one was frightened by his anthrax hoax).

503. See *infra* PROPOSED STATUTE § B.1.

504. See *id.* §§ B.2(a)-(c).

505. See *id.* § B.2(a). Virginia recently enacted a hoax statute with a similar *mens rea* requirement. See VA. CODE ANN. § 18.2-46.6(C) (Michie 2003) (prohibiting placement of a hoax weapon of mass destruction "with the intent to (i) intimidate the civilian population, (ii) influence the conduct or activities of the government of the United States, a state or locality through intimidation, (iii) compel the

hoaxster intends to affect large segments of the population, such as a city or region, rather than a private individual.<sup>506</sup>

Mentes reae dealing with hoaxes targeting private individuals are critical due to the number and variety of hoaxes of this type perpetrated after September 11.<sup>507</sup> To deal with malicious hoaxes, the mens rea that should be proscribed is the "intent to threaten, scare, or coerce."<sup>508</sup> This intent is necessary to create a bright line between perpetrators who intend to frighten their victims and those who merely act recklessly or perform hoaxes as pranks or practical jokes.

To cover hoaxes made recklessly or in jest, the best provision would be one that criminalizes hoaxes perpetrated without the "intent to threaten, scare, coerce, or intimidate an individual or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government."<sup>509</sup> Put simply, strict liability—i.e., the absence of a mens rea requirement—should be appropriate for all hoax-type offenses that do not fall within the aforementioned mentes reae, with punishment in the form of restitution.<sup>510</sup> This catch-all category allows for prosecution of a hoax with any type of mens rea, including not only those committed in jest or with recklessness, but also those perpetrated with a type of mens rea that is not included in the other segments of the offense.<sup>511</sup>

### 3. *Terroristic threats mens rea*

The mens rea that should be proscribed for terroristic threats is the "intent to deceive, threaten, scare, or coerce."<sup>512</sup> This is similar to the mentes reae recommended for false reports and hoaxes in which the perpetrator intends to frighten the victim.<sup>513</sup> "Deceive" is added to

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emergency evacuation of any place of assembly, building or other structure or any means of mass transportation, or (iv) place any person in reasonable apprehension of bodily harm").

506. See, e.g., Ronson, *supra* note 12, at 16 (relating the story of Clay Waagner, who sent approximately 800 anthrax hoax letters to abortion clinics).

507. See, e.g., Ellis, *supra* note 158, at 1A (reporting the guilty plea of Mohammad Yaseen Haider for sending anthrax threats via e-mail to a former love interest); Shields, *supra* note 150, at 1B (discussing the story of Melinda Rosemarie Smith, a woman arrested for sending hoax anthrax letters to intimidate her romantic competitor).

508. See *infra* PROPOSED STATUTE § B.2(b).

509. See *id.* § B.2(c).

510. See *id.*

511. See N.C. GEN. STAT. § 14-288.24 (2001) (requiring hoaxsters to have the "intent to perpetrate a hoax"). This type of mens rea covers hoaxsters who have an intent that the legislatures to date have not considered, thereby serving as a "catch-all" that is needed to cover all hoaxes.

512. See *infra* PROPOSED STATUTE § B.3.

513. See *id.* § B.1.

the mens rea here in order to prosecute hoaxsters who threaten their victim with the hope that he or she will actually believe that the threat will be consummated rather than just fear that it might happen.<sup>514</sup>

#### D. Penalty

As previously described,<sup>515</sup> many states have overcriminalized hoaxes after the terrorist attacks on September 11 and the ensuing anthrax scares. The result is that many people who committed hoaxes in jest face serious jail or prison time. While some punishment is appropriate for those individuals, severe punishment may go too far.<sup>516</sup>

The only way to ensure that the punishment is proportional to the crime is to base criminal liability on the perpetrator's mens rea.<sup>517</sup> False reports should be punished more harshly than hoaxes because the perpetrator always risks and usually intends an emergency response.<sup>518</sup> Terroristic threats should face the most severe punishment because the perpetrator threatens to use an actual weapon rather than a hoax weapon.

Violators of any of the three offenses—including those who act jokingly or recklessly<sup>519</sup>—should be strictly liable to any government entity for payment of restitution for the costs associated with that entity's actions in response to the hoax and to any person or company for the actual value of any goods, services, income, or property value lost as a result of the hoax.<sup>520</sup> If anyone is seriously injured or killed as a result of the hoax, offenders should be

514. See, e.g., H.R. 7986, 2002 Gen. Assemb. (R.I. 2002) (requiring perpetrators of false reports to cause the victim to experience "anxiety, unrest, fear, or personal discomfort").

515. See *supra* Part IV.D.

516. See *id.* (comparing the various punishments for different types of hoaxsters, some of which are appropriate and some of which are overly severe).

517. See, e.g., TENN. CODE ANN. § 39-13-808(a) (2002) (requiring that the hoaxster employ a hoax substance "that is intended to, or that such person has reason to believe may, create a fear or apprehension on the part of any other person that such substance may be a biological warfare agent").

518. See S.C. CODE ANN. § 16-23-730 (Law. Co-op. 2002) (punishing the manufacture of a hoax device with imprisonment for not more than one year and a fine not more than \$10,000, or both, and the communication to another "that a hoax device or replica is a destructive device" with imprisonment "not less than two years nor more than fifteen years"); *id.* § 16-23-750 (punishing an individual's first conviction for conveying false information with a prison term of not less than one year nor more than ten years, and an individual's second offense with a prison term of not less than five years nor more than fifteen years).

519. See OKLA. STAT. ANN. tit. 21, § 1268.1(3) (West 2003) ("Terrorism hoax" means the willful conduct to simulate an act of terrorism as a joke, hoax, prank or trick against a place, population, business, agency or government . . . ).

520. See *infra* PROPOSED STATUTE § C.1.

sentenced to a term of years—perhaps up to ten years for causing serious injury and up to life for causing death—in addition to the prescribed penalty for each individual offense.<sup>521</sup>

*E. Defenses to Hoax Crime Prosecution: Impossibility and Mistake*<sup>522</sup>

By nature, a hoax is not physically harmful to an individual but rather deceives the mind or creates an apprehension of something that is not real.<sup>523</sup> Criminalizing otherwise innocuous or equivocal actions remains a distinct possibility unless legislators are aware that proposed hoax legislation proscribe conduct that could not cause harm. As such, impossibility might be raised as a defense because of the inherent impossibility of a hoax weapon actually causing harm.<sup>524</sup>

In classic impossibility cases, case law does not allow impossibility to be a viable defense in situations in which the perpetrator would have been able to complete his crime, had the circumstances been what the perpetrator intended.<sup>525</sup> In contrast, many prank hoaxsters neither intended to harm any individual nor wanted to put the person in immediate fear for his or her life.<sup>526</sup> How, then, can impossibility be factored into the equation when drafting hoax crime legislation?

The Fourth Circuit has held that impossibility should not be a concern when federal statutes focus on the harm perceived by the intended victim.<sup>527</sup> Adopting a mens rea requirement that focuses on

521. See *id.* §§ C.2-3.

522. See generally Ira P. Robbins, *Attempting the Impossible: The Emerging Consensus*, 23 HARV. J. ON LEGIS. 377 (1986) (discussing the nuances of the impossibility defense to attempt crimes); John S. Strahorn, Jr., *The Effect of Impossibility on Criminal Attempts*, 78 U. PA. L. REV. 962 (1930) (examining some of the classic examples of the criminal attempt and what to make of criminalizing situations that cannot be consummated due to impossibility).

523. See WEBSTER'S THIRD NEW INT'L DICTIONARY 1075 (1993) (defining "hoax" as "to trick into believing or accepting or doing something[;] play upon the credulity of so as to bring about belief in or acceptance of what is actually false and often preposterous").

524. See WAYNE R. LAFAVE, CRIMINAL LAW § 11.5(a), at 596-98 (4th ed. 2003) (providing an overview of the impossibility doctrine, showing that impossibility is a viable defense if it negates the intent element of a crime). However, impossibility is not a defense to a crime if, had the facts been as the criminal defendant perceived them, he would have been able to successfully commit his intended act. *Id.* § 11.5(a), at 598-600. For example, if but for the fact that a gun were unloaded the criminal defendant would have murdered his intended victim when the criminal defendant places his gun to the temple of the victim, that criminal defendant can nonetheless be charged with attempted murder since, had things been the way he perceived, he would have been successful in carrying out his crime. *Id.* See generally Robbins, *supra* note 522, at 380-88.

525. See LAFAVE, *supra* note 524, at § 11.5(a); Robbins, *supra* note 522, at 380-88.

526. See *supra* Part I (reviewing a variety of hoaxes committed in circumstances in which the perpetrator did not intend harm to the victim).

527. See *United States v. Hamrick*, 43 F.3d 877, 880-84 (4th Cir. 1995) (finding

the mind of the victim, rather than on the mind of the perpetrator, might alleviate any concern about potential impossibility defenses to committing a hoax. For reasons previously discussed,<sup>528</sup> however, the mens rea should not focus solely on the victim's mindset, but rather use it only to determine the appropriate penalty. Moreover, impossibility should be unavailable as a defense to hoax crimes for one fundamental reason: questions regarding the defense of impossibility arise in cases of inchoate liability, such as attempt, solicitation, and conspiracy; as a separately delineated harm, a criminal hoax is not inchoate but rather is actually consummated.<sup>529</sup>

Because the fulcrum of many hoax crime bills depends on the victim's perception, impossibility will probably not be an affirmative defense for those who commit hoaxes on others.<sup>530</sup> However, one situation in which impossibility may play an interesting role in interpreting hoax crime legislation is when a hoax is committed against someone who has knowledge that the substance is a hoax and not a true weapon of mass destruction. If a criminal hoax statute takes into account the reasonable perception of the victim when deciding criminal liability for an alleged anthrax hoax, then some might argue that the impossibility of perceiving the weapon as real, because the victim had actual knowledge of the nature of the hoax, could provide a means for exculpation. This argument should fail, however, for this case would fall into the category of factual impossibility, which typically is not a good defense to a crime.<sup>531</sup>

Another interesting scenario might occur when an individual, thinking that a substance is talcum powder, mistakenly places anthrax

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that a dysfunctional homemade mail bomb was a "dangerous weapon" within the meaning of 18 U.S.C. § 111(b), both because the law may assume that a bomb is always dangerous and because its display instills fear in the average citizen). *But see* *People v. Campbell*, 532 N.E.2d 86, 88 (N.Y. 1988) (holding that "one cannot have the specific intent to cause an unintended injury," which points to a viable impossibility defense regardless of the intent requirement as long as the injury itself was unintended). This raises an interesting issue about how a court could rationalize an impossibility defense when the mens rea requirement merely required intent to deceive, because even if the individual did have the intent to deceive with a hoax weapon, the injury—including fright, hazmat clean-up, etc.—may be far from intended, although foreseeable.

528. See *supra* Part III.C.2.

529. See generally Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 9-34 (1989) (defining other inchoate crimes and distinguishing them from substantive crimes).

530. See OKLA. STAT. ANN. tit. 21, § 1268.1(3)(b) (West 2003) (including in its terrorist hoax provision a requirement that the hoaxster's conduct must "cause[] fear, intimidation or anxiety and a reasonable belief by any victim that such act or threat is an act of terrorism to disrupt any place, population, business, agency or government").

531. See Robbins, *supra* note 522, at 380-88.

on someone's desk. Although this would not be a hoax situation, since the perpetrator is dealing with actual anthrax, albeit unknowingly, he or she could still be prosecuted under many of the terroristic threat statutes that merely require a threat to terrorize.<sup>532</sup> The Model Penal Code describes a terroristic threat as committing "any crime of violence with purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or to otherwise cause serious public inconvenience."<sup>533</sup> While this scenario might seem unlikely, it supports the inclusion of the terroristic threat portion of the proposed legislation because it prevents defendants from successfully raising a mistake defense.

If a statute has a strict mens rea requirement of specific intent, a scenario involving real anthrax may trigger the mistake of fact defense. Model Penal Code § 2.04(1)(a) provides that ignorance or mistake of fact or law is a defense when it negates the existence of a mental state essential to the crime charged.<sup>534</sup> Therefore, drafting the terroristic threat section of hoax crime legislation with a requirement that the individual intends to use a weapon of mass destruction may encourage the use of a mistake of fact defense for the individual who believes that he or she is using talcum powder (or some other lawful substance) but really uses anthrax. To deal with these circumstances, I suggest that the model hoax crime statute consider the intent requirement as to the result of the threat rather than regarding the means by which the individual perpetrates the threat.

### CONCLUSION

The criminal hoax is a complex and interesting problem, and state and federal legislatures are struggling to issue a strong, yet just, statement regarding how they will punish this activity. Whether it is with new legislation or amended statutes, the unique challenges that these turbulent times present to local, state, and federal governments necessitate that legislatures take into account the real possibility that society is vulnerable to cataclysmic attacks by those using weapons of mass destruction. In response, legislatures will be challenged to

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532. See, e.g., CONN. GEN. STAT. ANN. § 53a-61aa(a)(1) (West 2003) (maintaining the mens rea requirement of "intent to terrorize" in the statute's provision for threatening in the first degree).

533. MODEL PENAL CODE § 211.3 (1985).

534. See *id.* § 2.04(1)(a) (1985) ("Ignorance or mistake as to a matter of fact or law is a defense if: the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense . . .").

develop laws with the fairness and proportionality that are the theoretical hallmarks of the American criminal justice system.

This proposed hoax crime legislation signifies the belief that there is a real difference between hoaxes made in jest and those committed with malice. Lawmakers may be tempted to forego this fundamental difference in order to make a strong statement about “terrorism” and gain political capital in the process. Although threats to the United States by our enemies have never been so serious, it is only with justice and compassion that our society perseveres. It is my sincere hope that these recommendations will live up to that challenge.

#### PROPOSED STATUTE

##### A. Definitions. For purposes of this section—

1. A weapon of mass destruction is any device that uses radiological, biological or chemical agents, or nuclear materials to cause harm.

2. A hoax weapon of mass destruction is any replica or facsimile of a weapon whose likeness is such that a reasonable person would perceive the weapon to be a real weapon of mass destruction, as defined in section A(1).

##### B. It shall be unlawful to—

1. Knowingly falsely report the location or placement at any place or structure of a weapon of mass destruction with the intent to threaten, scare, or coerce. Those found guilty of this offense will be subject to a term of imprisonment of not more than \_\_\_\_ years or a fine of not more than \$\_\_\_\_, or both.

2. Knowingly or intentionally conceal, distribute, place, mail, display, or use a hoax weapon of mass destruction to commit or cause to be committed an act likely to cause an individual to believe that he or she has been exposed to a weapon of mass destruction.

a. Those found guilty of violating section B(2) with the intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government will be subject to a term of imprisonment of not more than \_\_\_\_ years or a fine of not more than \$\_\_\_\_, or both.

b. Those found guilty of violating section B(2) with the intent to threaten, scare, or coerce will be subject to a term of imprisonment of not more than \_\_\_\_ years or a fine of not more than \$\_\_\_\_, or both.

c. Those found guilty of violating section B(2) without the intent to threaten, scare, or coerce or without the intent to intimidate

or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government will be subject to payment of restitution as described in section C(1) or to a fine of \$\_\_\_ if no costs are incurred, or if restitution is less than \$\_\_\_, to a fine equal to the remainder of \$\_\_\_ minus the restitution amount.

3. Intentionally threaten to use a weapon of mass destruction with the intent to deceive, threaten, scare, or coerce. Those found guilty of this offense will be subject to a term of imprisonment of not more than \_\_\_ years or a fine of not more than \$\_\_\_, or both.

C. Punishment

1. Those found guilty of violating section B(1), B(2), or B(3) will be strictly liable for payment of restitution to any government entity of the costs associated with that entity's actions in response to the hoax, and to any person or company for the actual value of any goods, services, income, or property value lost as a result of the hoax.

2. If, as a result of any of the above violations, any individual is seriously injured, those found guilty of the violation will be subject to a term of imprisonment of not more than \_\_\_ years in addition to the above-prescribed penalty.

3. If, as a result of any of the above violations, any individual is killed, those found guilty of the violation will be subject to a term of imprisonment of not more than \_\_\_ years in addition to the above-prescribed penalty.